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In the
Supreme Court of the United States

Public Service Commission of Utah,
Stephen F. Mecham, Constance B. White, and Clark D. Jones,
Commissioners of the Public Service Commission of Utah
PETITIONERS

v.

US West Communications, Inc., MCI Telecommunications Corp.,
and AT&T Communications of the Mountain States, Inc.
RESPONDENTS

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

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114 pp

QUESTIONS PRESENTED

The Federal Communications Act of 1996 requires that telecommunications companies provide other telecommunications companies with access to their networks and the interconnection of their networks. If telecommunications companies are unable to mutually agree upon the terms and conditions of their interconnection, they are to submit their disputes to state utility regulatory commissions. A state commission is to resolve the submitted disputed issues. A state commission is also to approve or reject a proposed interconnection agreement; whether the agreement is obtained entirely by mutual agreement of the parties, by state commission imposed resolution, or combination of the two.

Questions presented:

1. Whether, after *College Savings Bank*, Congress, acting pursuant to its Article I Commerce Clause power, may require the Public Service Commission of Utah to waive sovereign immunity in order to exercise traditional police powers when establishing the terms and conditions under which telecommunications companies will provide services to the citizens of the State of Utah.

2. Whether the Public Service Commission of Utah made a knowing and voluntary waiver of sovereign immunity, within the structure of the Federal Telecommunications Act of 1996, where is must choose to abdicate the exercise of traditional police powers to retain immunity or submit to federal court jurisdiction in order to fulfill important governmental obligations.

3. Whether the federal courts may extend their jurisdiction, in contravention to *Seminole Tribe* and beyond Congress' remedial scheme, and assert jurisdiction over the individual members of the Public Service Commission of Utah under the *Ex Parte Young* doctrine when a party is dissatisfied with a past decision of the Public Service Commission.

LIST OF PARTIES

Parties participating in the proceedings before the Tenth Circuit Court of Appeals, Case No. 99-4203, and their designation in these proceedings are:

Petitioners: Public Service Commission of Utah and individual commissioners Stephen Mecham, Constance White and Clark Jones;

Respondents: US West Communications, MCI Telecommunications and AT&T Communications. The United States Department of Justice also participated in the proceedings before the Tenth Circuit Court of Appeals and would be considered a respondent in the proceedings before this court.

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The petitioners, Public Service Commission of Utah, Stephen Mecham, Constance White and Clark Jones, respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on June 20, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 216 F.3d 929, 2000 U.S. App. LEXIS 14348, and is reprinted in the appendix hereto, Appendix p. 2, *infra*.

The memorandum decision of the United States District Court for the Central District of Utah (Kimball, D.J.) is reported at 991 F. Supp. 1299, 1998 U.S. Dist. LEXIS 7775, and is reprinted in the appendix hereto, Appendix p. 45, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered June 20, 2000, affirming the District Court's ruling that denied the state defendants' motion to dismiss for lack of federal court jurisdiction over the state defendants. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Article III,

Section 2, Clause 1 reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment to the Constitution of the United States reads as follows:

Suits Against States. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

47 U.S.C. §252(e)(6) reads as follows:

REVIEW OF STATE COMMISSION ACTIONS.-- In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State Commission makes a determination under this section, any

party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

STATEMENT OF THE CASE

The Public Service Commission is a state agency of the State of Utah, with the authority and responsibility to supervise and regulate all public utilities in the State of Utah[1]. Utah law permits multiple telecommunications companies to operate in the same geographic area and offer competing telecommunications services to the public.[2] Competing telecommunications companies are required by state law to interconnection their networks and permit other telecommunications companies to have access to their networks' facilities, functions and services.[3] The Public Service Commission is required to enforce these interconnection requirements and to resolve interconnection disputes between telecommunications companies.[4] The Public Service Commission is composed of three commissioners, each serving a six year term, appointed by the governor with the advise and consent of the state senate.[5]

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[1]Utah Code Ann. §54-4-1 (1994).

[2]Utah Code Ann. §54-8b-2.1 (1994).

[3]Utah Code Ann. §54-8b-2.2 (1994).

[4]*Id.*

[5]Utah Code Ann. §54-2-1.5 (1994).

An individual commissioner has no power or authority to transact or conduct any Public Service Commission business. A majority of the commissioners constitutes a quorum and a majority quorum is necessary to perform any duty or exercise any power of the commission.[6] Orders or decisions of the Public Service Commission are subject to direct judicial review by the Supreme Court of the State of Utah.[7]

US West Communications (hereafter US West), AT&T Communications of the Mountain States (hereafter AT&T) and MCI Telecommunications (hereafter MCI) are telecommunications companies certificated by the State of Utah to provide public telecommunications services in the State of Utah. Under state and federal law, they are required to interconnect their networks. US West is obligated to provide the other telecommunications companies with access to various portions of its equipment, facilities, and services.[8] Separately, both AT&T and MCI sought state regulatory commission resolution of various interconnection issues upon which they had failed to reach mutual agreement with US West. The Public Service Commission of Utah (hereafter Utah Commission) consolidated the state agency administrative actions, resolved the disputes and directed the parties to prepare interconnection agreements consistent with the ordered resolutions. The Utah Commission then reviewed and approved the submitted interconnection agreements.

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[6]Utah Code Ann. §54-1-3 (1994).

[7]Utah Code Ann. §78-2-2 (1996).

[8]47 U.S.C. §251 and Utah Code Ann. §54-8b-2.2 (1994).

Pursuant to 47 U.S.C. §252(e)(6), MCI sought federal court review of its interconnection agreement with US West and US West sought review of the two interconnection agreements (the agreement with MCI and the agreement with AT&T).[9] Both US West and MCI alleged that the Utah Commission approved interconnection agreements contained terms which were contrary to the provisions of the Federal Telecommunications Act of 1996, Public L. No 104-104, 110 Stat. 56 (1996) (hereafter the1996 Act). The Utah Commission, the individual commissioners of the Utah Commission and MCI were able to stipulate to terms by which the state defendants agreed to appear in federal district court and participate in MCI's initiated action. The state defendants and US West were unable to reach a similar stipulation relating to US West's federal court action. The Utah Commission and individual commissioners moved for their dismissal from the US West initiated action. The Federal District Court for Utah, Judge Dale A. Kimball presiding, denied the state defendants' Motion to Dismiss. *US West Commun. v. Public Service Comm'n of Utah*, 991 F. Supp.1299 (D. Utah 1999).The District Court ruled that it had jurisdiction over the state defendants by concluding that the State of Utah had waived sovereign immunity under the District Court's application of this Court's ruling in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S. Ct. 2219, 1999 U.S. LEXIS 4375 (1999). The District Court characterized

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[9]In addition to the 1996 Act, both MCI and US West alleged federal district court jurisdiction pursuant to 28 U.S.C. §§1331 and 1337. US West alleged further jurisdiction under 28 U.S.C. §§2201-02 (the Declaratory Judgement Act).

the1996 Act as Congress' gratuity offered to the states; to resolve interconnection disputes and approve interconnection agreements on condition of waiver of sovereign immunity. The District Court further concluded that it could exercise jurisdiction over the individual commissioners of the Utah Commission under the exception to sovereign immunity articulated in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).

The state defendants brought appeal to the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit Court affirmed the District Court's ruling. *MCI Telecommun. Corp. v. Public Service Comm'n of Utah*, 216 F. 3d. 929, 2000 U.S. App. LEXIS 14348 (10th Cir. 2000). The Tenth Circuit Court, using the gratuitous gift discussion found in *College Savings Bank*, concluded that "with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in Petty and Dole, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity." *MCI Telecommun., supra*, 216 F. 3d at 938. The Tenth Circuit Court rejected the state defendants' argument that if the gift/gratuity discussion has application, the 1996 Act results in an impermissible sanction, not a gratuity. Although both the majority and the dissent in *College Savings Bank* note that a state does not voluntarily waive immunity where Congress' offered inducement is substantial, the Tenth Circuit Court stated that "the size of the 'gift' was not an issue in College Savings Bank because 'the point of coercion [was] automatically passed' when Congress

conditioned participation in an otherwise lawful activity on a state's consent to suit. Id. Thus, the Court's discussion of the coercion theory was merely dicta." *Id.*, 216 F. 3d at 938, n. 6. The Tenth Circuit Court further ruled that the case presented a "straightforward Ex Parte Young case" and federal court jurisdiction could be exercised over the individual commissioners of the Utah Commission. *Id.*, 216 F. 3d at 939.

REASONS FOR GRANTING THE WRIT

I. Contrary to this Court's decision in *College Savings Bank*, the Tenth Circuit Court's ruling permits Congress' Commerce Clause power to require the States to waive sovereign immunity in order to exercise police power.

In *College Savings Bank*, this Court stated its intent to"drop the other shoe" and overrule any remaining application of "the constructive-waiver experiment" of *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964). *College Savings Bank, supra,* 527 U.S. at 680. Some federal courts have recognized that the shoe has dropped. *Chavez v. Arte Publico Press*, 157 F. 3d 282, 289 (5th Cir. 1998) ("[W]e must 'drop the other shoe,' and declare that Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court."), and *GTE North, Inc. v. Strand*, 209 F. 3d 909, 922 n. 6 (6th Cir. 2000)("[I]t is virtually certain that a state utility commission's decision to accept regulatory authority under the FTA [the 1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity. The Supreme Court's recent decisions . . . undermine earlier

circuit court decisions holding that the Eleventh Amendment does not bar suits against state utility commission because such commissions constructively waive their immunity from suit by participating in the regulatory scheme established by the FTA." (Internal citations omitted)). *See, also, Wisconsin Bell v. Public Service Comm'n of Wisconsin*, 57 F. Supp.2d 710 (W.D. Wis. 1999), *Bell Atlantic-Maryland v. MFS Intelenet of Maryland*, ____ F. Supp. ___ , 1999 U.S. Dist. LEXIS 16477 (D. Md. 1999), *AT&T Commun. v. BellSouth Telecommun.*, 43 F. Supp. 2d 593 (M.D. La. 1999). Other federal courts have not. These cobbler federal courts continue to apply the constructive waiver shoe, but now dressed as a gratuitous Congressional offer. *E.g.*, the Tenth Circuit Court ruling herein and *MCI Telecommun. Corp. v. Illinois Bell Tel. Co.*, __ F. 3d __, 2000 U.S. App. LEXIS 17739 (7th Cir. 2000). The Tenth Circuit Court's continued application of a constructive waiver theory is not consistent with *College Savings Bank*'s rationale; either the majority's or the dissent's. Without guidance from this Court, this split between the federal courts will continue to deepen.[10] Without further

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[10]The application of *College Savings Bank* in connection with the 1996 Act and state regulatory commissions is raised in numerous, pending circuit court proceedings. *BellSouth Telecommun. v. North Carolina Util. Comm'n*, Nos. 99-1845 *et.al.* (4th Cir. filed June 21, 1999) and *Bell Atlantic-Maryland v. MCI Worldcom,* Nos. 99-2459 *et al.* (4th Cir. filed October 29, 1999), argued seriatim May 1, 2000; *AT&T Commun. v. BellSouth Telecommun.*, No. 99-30421 (5th Cir. filed April 12,1999); *Southwestern Bell Tele. Co. v. Connect Commun.*, No. 99-3953 (8th Cir. filed October 21, 1999); *MCI Telecommun. v. BellSouth Telecommun.*, No. 00-13505FF (11th Cir. filed July 7, 1999). The split is real, as

direction from this Court, some federal courts will continue to craft the loss of state sovereign immunity through *Parden* style constructive waivers (albeit with the new lexicon of "Congressional gratuity"), while other federal courts will continue to recognize the states' constitutionally protected immunity right.

Application of a renamed constructive waiver fiction is contrary to *College Savings Bank*'s ruling:

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states and their state regulatory commissions and officers are viewed as proper defendants in some circuits, while in other circuits they are recognized to be beyond a federal court's jurisdiction on account of their sovereign immunity. The issue has and continues to be raised in federal court proceedings throughout the country, seeking review of arbitrations and interconnection agreement reviews, with divergent results. The issue will also arise in any instance where a state regulatory commission takes any action alleged to be inconsistent with the 1996 Act. Federal courts have stated that 47 U.S.C. §252(e)(6) federal court review is available not only to review the approval or rejection determinations of state regulatory commission, but also in any subsequent state agency action which has some relationship to an interconnection agreement. *See e.g., Iowa Util. Brd. v. F.C.C.,* 120 F.3d 753, 804 n 24 (8th Cir. 1997) (noting federal court review, pursuant to §252, of state commissions' enforcement decisions of previously approved interconnection agreements); and *Illinois Bell Tel. Co. v. WorldCom Techs. Inc.,* 179 F.3d 566 (7th Cir. 1999) (§252 federal court review of a state commission resolution of a contract interpretation dispute between two telecommunications companies).

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of Seminole Tribe. . . . "All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has authority to regulate conduct. Thus all federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and – to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability – can be redescribed as invitations to 'waiver.'" *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 43, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)(Scalia, J. dissenting).

College Savings Bank, supra, 527 U.S., at 683. The 'dropping the other shoe' phrasing itself originates with Union Gas, overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In his *Union Gas* dissent, Justice Scalia wrote,

> *Parden* is the only case in which we have held that the Federal Government can demand, as a condition of its permission of state action regulable under the Commerce Clause, the waiver of state sovereign immunity. Two terms ago, in Welch, ... We explicitly declined to address, however, the continuing validity of Parden's holding that

> explicitly declined to address, however, the continuing validity of Parden's holding that the Commerce Clause provided the constitutional power to make such a demand. I would drop the other shoe. There are obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state immunity exists. . . . At bottom, then, to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field the Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers – that is, to adopt the very principle I have just rejected.

Union Gas, *supra*, 491 U.S. at 42-44 (Scalia, J. dissenting)(internal citations omitted). The Tenth Circuit Court's opinion ignores the "obvious and fatal difficulties in acknowledging such a power." According to the Tenth Circuit Court, Congress, in enacting the 1996 Act pursuant to its Article I Commerce Clause power, may, indeed, demand that states waive their constitutionally protected sovereign immunity; this Court's rulings and analyses in *College Savings Bank, Union Gas* and *Seminole Tribe*, not withstanding. *College Savings Bank* is a significant opinion in our jurisprudence concerning the states' constitutionally protected sovereign immunity. The lower federal courts, however, apply *College Savings Bank* with increasingly divergent results. Clarification from this Court is needed. Direction is needed particularly where the state action, said to evidence the state's waiver of immunity, is not state operation

state's traditional police powers. State conduct in furtherance of its public interest and public policy should not be the consideration extorted from the state to support an implication of immunity waiver.

II. Preventing a state from enforcing its own laws, regulating its public right-of-ways, protecting consumers and other market participants, and protecting the public safety and welfare unless it waives immunity and submits to private party suits in federal court is not a knowing and voluntary waiver of sovereign immunity.

The Tenth Circuit Court concluded that the State of Utah made a knowing and voluntary waiver of sovereign immunity. Waiver exhibited through the Utah Commission's action in resolving the telecommunications companies' disputes and in reviewing the tendered interconnection agreements. This Court has recognized that state regulation of utilities "is one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 365 (1989). The Tenth Circuit Court's opinion strays due to its conclusion that the exercise of state police power is not an otherwise lawful activity of a state, but a federal gratuity. The Tenth Circuit Court's reliance upon *AT&T Corp. v. Iowa Utilities Broad*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) for this conclusion is not sound. *Iowa Utilities Board* did not address the source of state regulatory power, but the source of Federal Communications Commission (hereafter FCC) regulatory power to promulgate the regulations challenged in that case. *Iowa Utilities Board*'s ruling is based on a recognition of the jurisdictional authority of both the FCC and the states; that the1996 Act expanded

ruling is based on a recognition of the jurisdictional authority of both the FCC and the states; that the1996 Act expanded the FCC's authority into an area previously exclusive to the states.[11] "After the 1996 Act, . . . Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control." *Id.*, 525 U.S. at 381 n. 8. The source of the states' police power does not derive from a congressional gratuity. In the underlying administrative proceedings before the Utah Commission, AT&T and MCI recognized the existence and application of the state's police power. They requested that the Utah Commission go beyond the provisions of the 1996 Act and resolve some of their disputed interconnection issues on the basis of state law and state policies. Even if the Utah Commission's ability to resolve an interconnection dispute between two telecommunications companies is based solely on the 1996 Act, the Utah Commission is required to do much more than intercede between the two bickering companies.

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[11]Prior to the 1996 Act, Utah law had already required telecommunications companies to interconnect their networks and provide reciprocal access to their networks' facilities and services. Utah Code Ann. §54-8b-2.2 (1999 Supplement). Utah law charged the Utah Commission with enforcing these obligations and resolving interconnection disputes between telecommunications companies. *Id.* Hence, the Utah Commission's authority for its action is not dependent upon any Congressional gratuity said to be offered in the 1996 Act. Congress made explicit its intent that the 1996 Act was not to be construed as preempting preexisting state laws and authority. See, Sections 101 (codified at 47 U.S.C. §252(e)(3)) and 601 of the 1996 Act.

reflects Congress' anticipation, actual expectation, that the states will apply their traditional police power in other areas. The states are expected to ensure that there is no discrimination against other telecommunications market participants. 47 U.S.C. §252(e)(2)(A)(i). States are expected to establish and enforce the requirements of state law. 47 U.S.C. §252(e)(3). States are expected to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C.§253(b). States are to manage the public right-of-ways and require fair compensation for the use of such public property. 47 U.S.C. §253(c). The very process by which the 1996 Act dictates that the states are to exercise their police power in furtherance of these important state areas of concern, however, is the conduct which the Tenth Circuit Court's approach treats as evidencing the state's knowing and voluntary waiver of immunity. If the state wishes to retain immunity and does not avail itself of Congress' dictated process, the state faces the prospect that offending terms or conduct are assumed to have state approval, with no possibility of state court intervention. 47 U.S.C. §252(e)(4).

In *College Savings Bank, supra*, this Court held that Congress may not condition the waiver of state immunity upon the loss of a substantial state interest. *Id.*, 527 U.S. at 687. The Tenth Circuit Court's ruling equates a state's exercise of traditional police power in regulating utilities with a state's knowing and voluntary waiver of immunity. This is an important question of federal law which has not been and should be decided by this Court.

The Tenth Circuit Court's decision is based upon its characterization of the state's conduct as permitted by a

The Tenth Circuit Court's decision is based upon its characterization of the state's conduct as permitted by a gratuity from Congress. Without further clarification of this Court's intent or meaning in the *College Savings Bank* discussion of Congressional gifts and sanctions, the Tenth Circuit Court's ruling will countenance the conclusion that Congress can prevent the states from exercising traditional police power (in preventing discrimination, safeguarding consumers, protecting the public safety and welfare or regulating the use of public property) unless the states waive their immunity. This is not consistent with the views expressed by either the majority or the dissent in *College Savings Bank*.[12] Without further direction from this Court, our jurisprudence will accept the anomaly that state sovereign immunity precludes private party suits, against a state and its agencies in federal courts, when a state acts like an ordinary market participant, but sovereign immunity is not applicable where a state acts as a sovereign. Immunity would apply where a state acts to market and sell securities or investments, *College Savings Bank*, *supra*; where a state acts to operate a commercial tug boat service, *Ex parte New York*, 256 U.S. 490, 65 L. Ed.1057, 41 S. Ct. 588 (1921); where a state operates a commercial publishing/printing enterprise, *Chavez v. Arte Publico Press*, *supra*. But, where a state acts in areas in which only sovereigns act, to protect and further

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[12]While the dissent may accept Congress' Commerce Clause power to condition state commercial activities on the condition of waiver, it would not do so for a state's activities in "the area of its 'core' responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation." *College Savings Bank, supra,* 527 U.S. at 694 (Breyer, J., dissenting).

Telecommun. Corp. v. Public Service Comm'n of Utah, *supra*, and *MCI Telecommun. Corp. v. Illinois Bell Tel. Co.*, *upra*.

III. The Tenth Circuit Court's ruling permits federal courts to apply the Ex parte Young doctrine contrary to Congress' intended remedial scheme and contrary to the states' sovereign immunity.[13]

When Congress enacted the 1996 Act, it created rights and imposed duties for telecommunications companies which the federal government had previously not expected of the telecommunications industry. *See*, 47 U.S.C. §251 and *Iowa Utilities Board*, *supra*. Rather than passing legislation which simply created these benefits and obligations, Congress also specified a detailed remedial scheme. An enforcement scheme whereby a telecommunications

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[13]The issues raised in this portion of Utah's Petition for Writ of Certiorari are identical or similar to the issues, relating to the application of the *Ex Parte Young* doctrine, raised in the Petitions for Writ of Certiorari filed by the State of Michigan in this Court's Proceedings Nos. 99-1878, *John G. Strand, et.al. v. Michigan Bell Telephone, et al.* and 00-101, *John G. Strand et al. v. GTE North Incorporated, et al.* The Utah Commission participates in the 99-1878 proceeding through the *Amici Curiae* Brief of the State Commissions of Pennsylvania, Arkansas, California, Florida, Hawaii, Kentucky, Maine, Maryland, Montana, Nevada, New Hampshire, New York, North Carolina, Tennessee, Utah, Virginia, and Wisconsin, and the States of Delaware, Indiana and Ohio Supporting Petitioners.

Congress also specified a detailed remedial scheme. An enforcement scheme whereby a telecommunications company would obtain the benefits of the rights so created and, concomitantly, other telecommunications companies would fulfill their new obligations. Similar to the remedial scheme Congress relied upon in the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701 et seq.), Congress' remedial scheme for the 1996 Act does not primarily rely upon the courts for enforcement of the rights and obligations created. Like the Indian Gaming Regulatory Act, the 1996 Act's scheme imposes obligations upon competing parties and contains specific time lines for the parties (telecommunications companies) to make contractual agreements, negotiating in good faith; reliance not upon courts to resolve negotiating impasses, but upon other third party entities (state commissions) to attempt to mediate or to arbitrate disputes, again within specified time lines; and a limited role for the courts to review specified aspects of the precedent enforcement scheme created by Congress. 47 U.S.C. §252.

In the circumstances as those which underlie in this case (where a state commission has acted), Congress specified a very limited role for the federal district courts, vis, "to determine whether the agreement or statement meets the requirements of section 251 and this section [252]." 47 U.S.C. §252(e)(6). In *Seminole Tribe*, *supra*, this Court held that suit against State of Florida officials could not be maintained under the *Ex parte Young* doctrine because the Indian Gaming Regulatory Act contained Congress' remedial scheme, which was not to be supplanted by the courts. *Id.*, 517 U.S. at 75, 76. The Tenth Circuit Court's ruling creates a substitute role for the federal district courts in regards to the 1996 Act. The Tenth Circuit Court's ruling greatly expands

agreement for compliance with the two identified code sections, the full remedial powers of a federal court under *Ex parte Young* may now be wielded against an individual member of a state regulatory commission.[14]

Seminole Tribe does not prevent Congress from including *Ex parte Young* type of relief in its limited remedial scheme. *Id.*, 517 U.S. at 75, n. 17. But courts should ensure that that is Congress' intent. They are to consider whether Congress' statutory enactment evidences such intent. *Id.* Using the analytical approach used by this Court in *Seminole Tribe*, one must conclude that *Ex parte Young* has no application in the 1996 Act. Throughout the 1996 Act, Congress' reference is to states or state commissions; not once did Congress refer to or identify an individual officer of a state regulatory commission. The 1996 Act evidences Congress approaching the states as states, not seeking to

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[14]The expansive nature of the Tenth Circuit Court's ruling is not limited to state regulatory commission officers. Since the interconnection agreements are contracts between the telecommunications companies, what is to occur where one party seeks enforcement of the contract in a state court, as a normal contract dispute? Are state court judges to be subject to a federal court *Ex Parte Young* based suit if one of the parties is disappointed with the judge's resolution of the dispute? Since the states are also required to pursue the protection of their property interests in public right of ways under the 1996 Act's provisions, are the personnel of state agencies responsible for the management or policing of public right of ways also within the reach of the Tenth Circuit Court's approach? These state officers are far beyond Congress' reference to state utility commissions in the 1996 Act.

a state regulatory commission. The 1996 Act evidences Congress approaching the states as states, not seeking to reach individual state officers through an *Ex parte Young* approach. Without further direction from this Court, federal courts are misled by the Tenth Circuit Court's conclusion and apply the *Ex parte Young* doctrine beyond circumstances intended by Congress.

At the heart of US West's complaint is dissatisfaction with a past ruling of the Utah Public Service Commission. The Tenth Circuit Court's holding permits anticipatory pleading to transform what is otherwise a request to review a past administrative agency decision into an *Ex parte Young* proceeding in federal court. The federal courts have been euchred into applying *Ex parte Young* in the very circumstances cautioned against in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). "To interpret Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." Ultimate protection of constitutionally protected rights is the unique province of this Court. Where lower courts have improperly impinged upon the sovereign immunity of the states, this court should intervene to prevent future violations of this important right.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted, October, 2000

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OPINIONS

MCI Telecommunications, Corp. v. Public Service Commission of Utah, Tenth Circuit Court of Appeals, No. 99-4203; 216 F. 3d 929.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation,

Plaintiff - Appellee,

US WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Counter-Defendant - Appellee,

v.

PUBLIC SERVICE

FILED
United States Court of Appeals
Tenth Circuit
JUN 20 2000

PATRICK FISHER
Clerk

No. 99-4203

COMMISSION OF UTAH;
STEPHEN F. MECHAM;
CONSTANCE B. WHITE;
CLARK D. JONES,
Commissioners of the Public Service Commission of Utah,

Defendants - Appellants,

and

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., a New York corporation,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D. Ct. No. 98-CV-490)

Sandy J. Mooy, Utah Public Service Commission (Annina Mitchell, Assistant Attorney General, with her on the briefs), Salt Lake City, Utah, appearing for Defendants-Appellants.

Mark B. Stern, Attorney (William B. Schultz, Acting Assistant Attorney General, David J. Schwendiman, United States Attorney, Susan L. Pacholski, Attorney, Christopher J. Wright, General Counsel, John E. Ingle, Deputy Associate General Counsel, and Susan L. Launer, Deputy Associate General Counsel, with him on the brief), Appellate Staff Civil Division, Department of Justice, Washington, DC, appearing for the Defendant-Intervenor-Appellee.

Paul M. Smith, Jenner & Block, Washington, DC (Thomas F. O'Neil, III and William Single, IV, MCI Worldcom, Inc., Washington, DC, J. Alex Ward, Jenner & Block, Washington, DC, counsel for MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc.; Phillip L. Douglass, US West Law Department, Denver, Colorado, and Kara Sacilotto, Perkins, Coie LLP, Washington, DC, counsel for US West Communications, Inc.; Daniel Waggoner, Davis, Wright, Tremaine, LLP, Seattle, Washington, Thomas Pelto and Rebecca DeCook, AT&T Communications, Denver, Colorado, counsel for AT&T Communications of the Mountain States, Inc., with him on the brief), appearing for Appellees.

Before **TACHA**, **BALDOCK**, and **BRORBY**, Circuit Judges.

TACHA, Circuit Judge.

Defendants-appellants the Utah Public Service Commission (UPSC) and the individual commissioners appeal the district court's denial of their motion to dismiss on Eleventh Amendment immunity grounds. Defendants also contest the district court's conclusion that it has jurisdiction to consider US West's takings claim. We exercise jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine, see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993), and affirm. We do not reach the merits of

defendants' argument on the takings claim.

I. Telecommunications Act of 1996

A. History

This case arises under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 2000)) ("1996 Act" or "Act"). The 1996 Act amended the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 2000)) ("1934 Act"). Congress adopted the 1934 Act "to protect American consumers against AT&T which, through an aggressive policy of consolidation, had gained a virtual monopoly over all segments of the telecommunications industry. Telephone service as a whole was viewed as a natural

monopoly which needed to be regulated for the benefit of all users." Michael Kerf & Damien Geradin, Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences, 14 Berkeley Tech. L.J. 919, 936 (1999). Thus, pursuant to the 1934 Act, Congress created the Federal Communications Commission (FCC), and gave that agency jurisdiction to regulate interstate telephone services. See Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C.A. § 151) (creating the FCC and giving it authority over "interstate and foreign commerce in communication by wire and radio").

The 1934 Act left regulation of intrastate

telephone services to the states. See id. § 2(b) (codified as amended at 47 U.S.C.A. § 152) (denying the FCC jurisdiction "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier"). In regulating local phone service,

> [s]tates typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). Most of the LECs were part of AT&T's Bell System and were known as Bell Operating Companies ("BOCs"). Kerf & Geradin,

14 Berkeley Tech. L.J. at 937.

"As the telephone industry developed in the 1950s and 1960s, many began to challenge the basic premise that telephone service was a natural monopoly." Id. Eventually, potential competitors and the Department of Justice sued AT&T to dismantle its virtual monopoly. Pursuant to a 1982 consent decree, AT&T agreed to divest the local BOCs and reorganize them into subsidiaries of seven independent local exchange carriers, known as regional BOCs. See United States v. Western Elec. Co., 569 F. Supp. 1057, 1061-62 & 1062 n.5 (D.D.C. 1983), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983). In exchange, AT&T was permitted, among other things, to compete with virtually no restrictions in long-distance

services. Kerf & Geradin, 14 Berkeley Tech. L.J. at 938.

While the 1982 consent decree fostered competition in the long-distance market, technological advances occurred that made "competition among multiple providers of local service seem possible." AT&T Corp., 952 U.S. at 371. Thus, by 1994, "[m]any states had already commenced their own efforts to deregulate the telecommunications industry" by permitting local competition. Deonne L. Bruning, The Telecommunications Act of 1996: The Challenge of Competition, 30 Creighton L. Rev. 1255, 1258 (1997). In 1996, Congress passed the Telecommunications Act to further encourage local competition. See Jim Chen, The Magnificent Seven: American Telephony's

Deregulatory Shootout, 50 Hastings L.J. 1503, 1514 (1999) ("The Act sought to unleash three of the most deeply entrenched monopolists in the American economy–local exchange carriers, interexchange carriers, and cable system operators–on each other's markets in the hope that competition among the large would dissolve these industrial giants.") In so doing, Congress "fundamentally restructure[d] local telephone markets" and "ended the longstanding regime of state-sanctioned monopolies." AT&T Corp., 952 U.S. at 371.

B. 47 U.S.C.A. §§ 251-252

1. Section 251

To accomplish the goals of the Act, Congress "establish[ed] baseline rules for every company that want[s] to provide telecommunications service."

Bruning, 30 Creighton L. Rev. at 1258. Specifically, 47 U.S.C.A. § 251 imposes various duties on incumbent LECs to facilitate market entry. Because incumbents own the current network, "[f]oremost among these duties is the [incumbent] LEC's obligation . . . to share its network with competitors." AT&T Corp., 952 U.S. at 371; see 47 U.S.C.A. § 251(c). Congress deemed network sharing, or interconnection, necessary "so that all customers, even those served by a competitor, can seamlessly and transparently make and receive calls." Bruning, 30 Creighton L. Rev. at 1259. Section 251 thus requires incumbents to negotiate interconnection agreements with entrants in good faith. See 47 U.S.C.A. § 251(c)(1).

2. Section 252

Under § 252, an incumbent and a new carrier may privately agree on the terms of an interconnection agreement. See id. § 252(a)(1). If private negotiation fails, then either party can petition the state commission that regulates local phone service to arbitrate any open issues. Id. § 252(b)(1). Whether an agreement is adopted by negotiation or arbitration, it must be submitted to the state commission. Id. § 252(e)(1). The state commission then must approve or reject the agreement. Id.

A state commission may reject a negotiated agreement only if it discriminates against non-party carriers or is inconsistent with the public interest, convenience, and necessity. Id. § 252(e)(2)(A). On the other hand, a state commission may reject an arbitrated

agreement only if the agreement does not comply with § 251, including the regulations prescribed by the FCC pursuant to § 251, or the pricing standards set forth in § 252(d). Id. § 252(e)(2)(B).

If a state commission does not approve or reject an agreement within specified time periods, then the agreement is deemed approved. Id. § 252(e)(4). However, if a state commission "fails to act to carry out its responsibility under [§ 252]," then the FCC will preempt the state commission's jurisdiction over that proceeding and assume the state commission's responsibility. Id. § 252(e)(5).[1] If a state commission

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[1]A state commission "fails to act" if it "fails to respond, within a reasonable time, to a request for mediation . . . or . . . a request for arbitration . . . or fails to complete an arbitration within the time limits established in section 252(b)(4)(C)." 47 C.F.R. § 51.801(b) (1999). A state commission does not fail to act "if an agreement is deemed

does act, any party "aggrieved" by its determination "may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 [and section 252]." Id. § 252(e)(6). State courts do not "have jurisdiction to review the action of a State commission in approving or rejecting an agreement." Id. § 252(e)(4). If a state commission fails to act and the FCC asserts jurisdiction, then "the proceeding by the [FCC] . . . and any judicial review of the [FCC's] actions shall be the exclusive remedies." Id. § 252(e)(6).

Thus, § 252 allows a state to choose whether it will participate in the federal regulatory scheme. If a

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approved under section 252(e)(4)." Id. § 51.801(c). Thus, if a state commission does not approve or reject an agreement and it is deemed approved, the FCC cannot preempt the state commission's jurisdiction and review the agreement.

state elects to regulate interconnection agreements through its state commission, then the state is subject to suit in federal court.

II. Facts

On July 26, 1996, AT&T Communications of the Mountain States, Inc. ("AT&T"), filed a petition with the UPSC for arbitration with US West Telecommunications, Inc. ("US West") pursuant to § 252(b) of the Act. On September 3, 1996, MCI Metro Access Transmission Services, Inc. and MCI Telecommunications Corp. (collectively MCI) filed a similar petition for arbitration with US West. After consolidating the AT&T and MCI petitions, the UPSC issued an arbitration order resolving a number of open issues. The order directed the parties to file fully

executed interconnection agreements with the UPSC that were consistent with the UPSC's resolution of the parties' disputes. The UPSC then reviewed and approved the submitted interconnection agreements pursuant to 47 U.S.C.A. § 252(e).

US West subsequently filed suit against AT&T, MCI, the individual commissioners, and the UPSC in federal district court. US West challenged some provisions in its interconnection agreements with MCI and AT&T, raised a takings claim and sought declaratory and injunctive relief. On the same day, MCI filed suit against US West, the individual commissioners and the UPSC. After the district court consolidated the suits, the individual commissioners and the UPSC moved to have themselves dismissed from US West's

suit pursuant to Fed. R. Civ. P. 12(b).[2] Defendants claimed that they were immune from suit under the Eleventh Amendment and that the district court did not have jurisdiction over US West's takings claim. The district court denied the motion, concluding that it had jurisdiction over defendants and the takings claim.

III. Eleventh Amendment Immunity

"We review de novo a district court's denial of a state's claim of Eleventh Amendment immunity from suit in federal court." Innes v. Kansas State Univ., 184 F.3d 1275, 1277 (10th Cir 1999), cert. denied, __ U.S. __, 120 S. Ct. 1530 (2000).

The Eleventh Amendment to the U.S. Constitution provides: "The Judicial power of the

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[2]Based on a stipulation reached with MCI, defendants did not move to have themselves dismissed from MCI's suit.

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has construed the Eleventh Amendment to mean that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

However, state sovereign immunity is not absolute. First, a state may not assert an Eleventh Amendment defense where Congress has properly abrogated its immunity. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996). Second, a state may waive its sovereign immunity by consenting to suit in

federal court. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 2223 (1999). Third, a private party may sue a state officer for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws. See Ex parte Young, 209 U.S. 123, 159-60 (1908); see also Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 2267 (1999) (affirming the continuing vitality of Ex parte Young).

IV. Analysis

Defendants contend that none of the limits on sovereign immunity apply to them, and that therefore they are immune from suit. The district court found that the UPSC waived its sovereign immunity when it opted to participate in the statutory scheme set forth in the Act.

The district court also found that the individual commissioners were subject to suit under Ex parte Young. We agree with both findings.[3]

A. Waiver

1. Means of Waiver

Generally, a state may waive its Eleventh Amendment immunity in one of two ways. First, a state waives its immunity if it voluntarily invokes the

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[3]The district court's opinion mentions abrogation in passing, and on appeal defendants' briefly argue that Congress could not have constitutionally abrogated state sovereign immunity through passage of the Act. Congress may abrogate the states' sovereign immunity in the exercise of its Section 5 power to enforce the Fourteenth Amendment. College Sav. Bank, 119 S. Ct. at 2224. After Seminole Tribe, however, "Congress may not abrogate state sovereign immunity pursuant to its Article I powers." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 2205 (1999). There is no question that Congress adopted both the 1934 Act and the 1996 Act pursuant to its Article I commerce power. Thus, we agree with defendants that Congress could not and did not abrogate the states' sovereign immunity under the 1996 Act.

jurisdiction of a federal court. See College Sav. Bank, 119 S. Ct. at 2226. Second, a state waives its immunity if it "makes a clear declaration that it intends to submit itself to [a federal court's] jurisdiction." Id. (internal quotation marks and citation omitted).

A state can make a "clear declaration" of its consent to be sued in federal court by expressly waiving its immunity through a state statute or constitutional provision. See Innes, 184 F.3d at 1278. A state can also declare its intent to submit to suit by impliedly or constructively waiving its immunity if the declaration is clear and altogether voluntary. See generally College Sav. Bank, 119 S. Ct. 2219 (overruling the constructive waiver doctrine of Parden v. Terminal Ry. of Ala., 377 U.S. 184 (1964), but recognizing that a state may still

constructively or impliedly waive its immunity in certain circumstances); see also Innes, 184 F.3d at 1280 (stating that nothing in College Savings Bank forecloses us from examining the underlying facts of a case to determine whether a state has unequivocally expressed its intent to waive its immunity).

Here, US West sued the UPSC and the individual commissioners. Accordingly, Utah did not invoke the jurisdiction of a federal court and thereby waive its immunity. Furthermore, Utah did not expressly consent to suit through a state statute or constitutional provision governing this case. See Utah Code Ann. § 63-30-16(1) (Supp. 1999) (providing that Utah state district courts have exclusive original jurisdiction over suits brought against the state); Sutton v. Utah State Sch. for the Deaf

& Blind, 173 F.3d 1226, 1233 (10th Cir. 1999) ("Utah has not waived its Eleventh Amendment immunity by statute."). Thus, the question is whether, under College Savings Bank, Utah constructively waived its immunity from suit when it arbitrated an interconnection dispute between US West, AT&T and MCI pursuant to § 252 of the Act.

2. College Savings Bank

Because College Savings Bank overruled Parden's constructive waiver doctrine, we begin with a brief discussion of Parden. In Parden, the employees of a railroad owned and operated by the State of Alabama sued the railroad under the Federal Employer's Liability Act (FELA). 377 U.S. at 184-85. Alabama asserted a sovereign immunity defense. Id. The Supreme Court

held that Alabama had waived its immunity because FELA conditioned a state's right to operate a railroad in interstate commerce upon amenability to suit in federal court. Id. at 192. Since Alabama chose to operate a railroad in interstate commerce, it impliedly accepted the conditions imposed by the act, including the condition that it consent to suit. Id.

In College Savings Bank, a New Jersey bank sued the Florida Prepaid Postsecondary Education Expense Board ("Florida Prepaid"), an arm of the State of Florida. 119 S. Ct. at 2223. Florida Prepaid administers a program designed to ensure that individuals have sufficient funds to finance a college education. Id. The bank claimed that Florida Prepaid misrepresented its product in its marketing brochures

and annual reports in violation of the Lanham Act. Id. As amended by the Trademark Remedy Clarification Act (TRCA), the Lanham Act provides that states are not immune from suit in federal court for violations of the Act. Id. Florida Prepaid claimed, however, that it was immune from suit because the TRCA was enacted pursuant to Congress's Article I power and Congress may not abrogate state sovereign immunity when it legislates under Article I. Id. at 2224. The bank contended that, under Parden, Florida Prepaid had waived its immunity when it engaged in the interstate marketing and administration of its program after the TRCA made it clear that such activity would subject Florida Prepaid to suit. Id. The Court overruled Parden and concluded that Florida Prepaid had not waived its

immunity. See id. at 2226-28.

The Court reasoned that it could not "square Parden with [its] cases requiring that a State's express waiver of sovereign immunity be unequivocal." Id. at 2228 (citing Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944)). "The whole point of requiring a 'clear declaration' by the State of its waiver is to be certain that the State in fact consents to suit." Id. Where Congress clearly expresses its intention that if a state takes certain action it will waive its immunity, "the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals." Id. However, this "is very far from concluding that the State made an 'altogether voluntary' decision to waive its immunity." Id.

Furthermore, if the Court recognized "a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers," it would thereby "permit Congress to circumvent the antiabrogation holding of Seminole Tribe." Id. at 2229 (emphasis added). "Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin." Id. (emphasis added).[4]

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[4]Defendants contend that College Savings Bank precludes Congress from using its commerce power to obtain a constructive or implied waiver from a state. They therefore argue that because Congress adopted the 1996 Act pursuant to its commerce power, § 252 cannot permissibly require states to constructively or impliedly waive their sovereign immunity. We disagree. The key to constructive or implied waiver under College Savings Bank is the voluntariness of the state waiver, not the particular power pursuant to which Congress enacted the statute. Under College Savings Bank, Congress may not exact or force a waiver from a state pursuant to any of its Article I powers.

Thus, for a constructive waiver of sovereign immunity to be valid under College Savings Bank, it must be altogether voluntary and not forced from a state by Congress. A constructive waiver is voluntary only where Congress threatens a state with the denial of a "gift or gratuity" if the state refuses to consent to suit in federal court. See id. at 2231. Where Congress threatens a state with a "sanction" if it refuses to consent to suit, then the waiver is no longer freely given. See id. In addition, it may be that the difference between a gift and a sanction disappears when the gift Congress threatens to withhold is large enough. See id.

To illustrate its holding in College Savings Bank, the Court distinguished the legitimate conditions Congress placed on states in Petty v. Tennessee-

Missouri Bridge Comm'n, 359 U.S. 275 (1959), and South Dakota v. Dole, 483 U.S. 203 (1987), from the forced waivers in Parden and the case at bar. In Petty, the Court held that a bistate commission created pursuant to an interstate compact "had consented to suit by reason of a suability provision attached to the congressional approval of the compact." College Sav. Bank, 119 S. Ct. at 2231 (citing Petty). In Dole, the Court held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." Id. (citing Dole).

The College Savings Bank court explained that

the bistate commission's waiver was valid because, under the Compact Clause of the U.S. Constitution, states may not form an interstate compact without the consent of Congress. Id.

The granting of consent therefore is a gratuity. Id. Similarly, "Congress has no obligation to disburse funds to the States; such funds are gifts." Id.

In contrast, in both Parden and the case before the Court, Congress did not threaten the denial of a gift or gratuity if the states refused to waive their sovereign immunity. See id. Instead, in both Parden and College Savings Bank, Congress threatened a sanction: "exclusion of the State from otherwise permissible activity." Id. Specifically, the federal statute in Parden required Alabama to waive its immunity or give up its

ability to own and operate a railroad in interstate commerce. In College Savings Bank, the TRCA required Florida to waive its immunity or give up its ability to engage in the business of advertising and selling a for-profit educational investment vehicle. The voluntariness of a waiver is destroyed "when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." Id.; see also Innes, 184 F.3d at 1284 (holding that a state university "knowingly and voluntarily" waived the state's immunity "by agreeing, as a prerequisite to its participation in the Perkins Loan program, to undertake certain enumerated actions in federal bankruptcy court in the event of a claim for discharge filed by the student-borrower").

3. Application of College Savings Bank

47 U.S.C.A. § 252 invites states to participate in the federal government's regulation of local telephone service. Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity. See 47 U.S.C.A. § 252(e)(6) ("In any case in which a State commission makes a determination under [§ 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court . . . ."); see also id. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.").[5] Thus, § 252 puts Utah on notice that

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[5]Utah's Governmental Immunity Act provides that "state" "means the state of Utah, and includes any . . .

Congress intends to subject it to suits brought by individuals if it acts under § 252. See College Sav. Bank, 119 S. Ct. at 2228. College Savings Bank, however, makes it clear that Congress's intent to effect a waiver is insufficient, standing alone, to render a state's waiver altogether voluntary. Id.

Instead, Utah has voluntarily waived its immunity only if Congress, through the 1996 Act, threatened it with the denial of a gratuity, rather than the imposition of a sanction. Prior to 1996, the states were permitted to regulate local phone service. Indeed, the

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commission." Utah Code Ann. § 60-30-2(9) (Supp. 1999). The UPSC therefore has the authority to act on behalf of Utah and can waive Utah's sovereign immunity. See Innes, 184 F.3d at 1284 (stating that even where a court finds a waiver of state sovereign immunity, it must determine if the waiver is valid by examining whether the defendant had the authority to waive the state's immunity).

1934 Act specifically left regulation of intrastate telephone services to the states. However, the 1996 Act preempted state regulatory authority over some aspects of local phone service. See AT&T Corp., 525 U.S. at 730 n.6 (stating that "[w]ith regard to matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States"). Although it did not do so, Congress could have preempted all state regulation of local phone service. See FERC v. Mississippi, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290-91 (1981).

Thus, with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in Petty and Dole, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.[6] We therefore hold

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[6]Defendants contend that Congress has imposed a sanction on them because if they refuse to consent to suit, Utah will be excluded completely from the regulation of interconnection agreements. They suggest that in this case, the difference between the denial of a gratuity and the imposition of a sanction has disappeared since Congress threatens to withhold such a substantial amount of regulatory authority. Seizing on language in College Savings Bank, they argue that the inducement offered by Congress is "so coercive as to pass the point at which pressure turns into compulsion." 119 S. Ct. at 2231 (internal quotation marks

that Utah voluntarily waived its sovereign immunity

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and citations omitted). This argument is without merit.

The size of the "gift" was not at issue in College Savings Bank because "the point of coercion [was] automatically passed" when Congress conditioned participation in an otherwise lawful activity on a state's consent to suit. Id. Thus, the Court's discussion of the coercion theory was merely dicta. See Kansas v. United States, __ F.3d __, 2000 WL 710489, at *6 (10th Cir. June 1, 2000) ("[T]he coercion theory is unclear, suspect, and has little precedent to support its application.").

Moreover, § 252 removes only a slice of regulatory authority from a state if it declines to waive its sovereign immunity. For example, to ensure that barriers to competition will fall, § 253 prohibits all state statutes and regulations that impede "the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C.A. § 253(a). Thus, § 253(a) effectively "strikes down all franchised monopolies that were given by the states to local exchange companies." Kerf & Geradin, 14 Berkeley Tech. L.J. at 940. However, § 253(b), captioned "State regulatory authority," contains a broad exception which provides that nothing in § 253 "shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus, state commissions may continue to regulate telecommunications in the public interest, as long as such regulations are competitively neutral.

when the UPSC, through its commissioners, arbitrated the interconnection dispute in this case.[7] Defendants are subject to suit in federal court, and this case may proceed.

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[7]The district courts are divided over whether, under College Savings Bank, a state waives its sovereign immunity when it accepts Congress's invitation to participate in the review of interconnection agreements under § 252. See, e.g., Bell Atlantic-Del., Inc. v. McMahon, 80 F. Supp.2d 218, 231-33 (D. Del. 2000) (finding a waiver); Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis., 57 F. Supp.2d 710, 714-16 (W.D. Wis. 1999) (finding no waiver). We are unaware of any circuit court that has decided this issue. See MCI Telecomms. Corp. v. Illinois Commerce Comm'n, 183 F.3d 558, 564-67 (7th Cir. 1999) (finding a constructive waiver), vacated and reh'g granted, 183 F.3d 567 (7th Cir. 1999) (ordering the parties to file supplemental briefs addressing the applicability of Alden v. Maine, 527 U.S. 706 (1999), College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), and Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999)); see also GTE North, Inc. v. Strand, 209 F.3d 909, 2000 WL 424028, at *12 n.6 (6th Cir. Apr. 20, 2000) (stating in dicta that "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity" after College Savings Bank and Florida Prepaid).

C. Ex Parte Young

Even if the Eleventh Amendment barred US West's suit against the UPSC, US West still could proceed with its suit against the individual commissioners. In a suit similar to the one at bar, the Sixth Circuit found that the matter before it was "a straightforward Ex parte Young case." Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F.3d 862, 867 (6th Cir. 2000). We conclude that the instant suit is also a straightforward Ex parte Young case and adopt the Sixth Circuit's rationale and holding:

> The Ex parte Young doctrine operates as an exception to the general rule of sovereign immunity that states may only be sued with their consent. Under Ex parte Young, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment. Ex parte Young, 209 U.S. at 159-60. The [UPSC] not only approved the

> interconnection agreement[s], it is responsible for ongoing enforcement of the agreement[s]. [US West] alleges that the agreement[s] violate[]federal law, and is seeking equitable relief [against the commissioners]. . . . Under Ex parte Young, [US West] is entitled to proceed.
>
> Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) and Idaho v. Coeur d'Alene Tribe, 521 U.S. 261(1997), do not affect the application of Ex parte Young to § 252 cases. Recently, the Supreme Court once again affirmed the vitality of Ex parte Young, even while strongly reaffirming states' rights against suit. See Alden v. Maine, 119 S. Ct. 2240, 2266-68 (1999) ([stating that] sovereign immunity does not bar certain actions against state officers for injunctive or declaratory relief).

Id. at 867-68 (parallel citations omitted).[8] Thus, we

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[8]Defendants contend that Seminole Tribe and Coeur d'Alene Tribe narrowed the Ex parte Young doctrine so as to make it inapplicable to this case. We have recognized that "Coeur d'Alene Tribe imposes an important additional requirement" upon the application of Ex parte Young. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1286 (10th Cir. 1999). Now, in an Ex parte Young case, "[w]e must examine whether the relief Plaintiff[] seek[s] against the state officials implicates special sovereignty interests, and whether that requested relief is the functional equivalent to a form of legal

hold that under Ex parte Young, the Eleventh Amendment does not bar US West's suit against the individual commissioners.

V. US West's Takings Claim

In its first amended complaint, US West claimed that the contractual provisions imposed upon it by the UPSC constitute a taking of its property for public use without just compensation in violation of the Fifth and Fourteenth Amendments. US West sought relief under 42 U.S.C. § 1983. Defendants moved to dismiss US West's takings claim under Fed. R. Civ. P. 12(b), and

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relief against the state that would otherwise be barred by the Eleventh Amendment." Id. (internal quotation marks and citations omitted). In this case, US West requests declaratory and injunctive relief to remedy actions by the commissioners which it claims are violations of federal law. Such relief would not affect any special sovereignty interests or otherwise cause offense to Utah's sovereign authority. Defendants' argument therefore is without merit.

the district court determined that it had jurisdiction over the claim. On appeal, defendants argue that US West cannot raise its takings claim in federal court until it attempts to obtain compensation through state procedures or pleads that it would be futile to do so. They claim that because US West has not yet gone through state channels, the takings claim is not ripe and the district court therefore does not have jurisdiction over it.

We find no indication in the record that defendants made this argument to the district court. Moreover, the district court did not discuss ripeness in its memorandum order denying defendants' motion to dismiss. The lower court merely found that US West brought its claim under the Fourteenth Amendment and

42 U.S.C. § 1983. The district court concluded that "[t]hese are appropriate channels for such claims and this Court has the proper jurisdiction to hear them." Mem. Order at 7. Whether the claim is ripe for judicial review is another question, one that the district court apparently did not address.

We see no reason to "depart from the general rule that 'a federal appellate court does not consider an issue not passed upon below.'" Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992) (quoting Singleton v. Wulff, 428 U.S. 106, 120 (1976)). We therefore decline to consider the merits of defendants' ripeness argument. The ripeness issue will be before the district court on remand.

AFFIRMED AND REMANDED.

U S West Communications, Inc. v. Public Service Commission of Utah, et al, 991 F. Supp. 1299 (D. Utah 1999)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

U S West Communications Inc. :
Plaintiff
:MEMORANDUM ORDER
VS.
:
Stephen F. Mecham, Constance White, Clark Jones, Commissioners of the Public: Service Commission of Utah; Utah Public Service Commission; AT&T Communications of the Mountain States, Inc.; and MCIMetro Access Transmission :
Services, Inc. :Case No. 2:98cv00490
Defendants :

MCI Telecommunications Corp. and :
MCI Metro Access Transmission :FILED
Services, Inc :Clerk, U.S. District Court
Plaintiffs :20 Sept 99 PM 1:13
VS.

:DISTRICT OF UTAH
:BY: DEPUTY CLERK

U S West Communications, Inc., the
Public Service Commission of Utah, and:
Stephen F. Mecham, Constance White,
Clark Jones, Commissioners of the Public:
Service Commission of Utah

:Case No. 2:98cv00488

Defendants

Before the Court is Defendant Public Service Commission of Utah and Defendants Stephen F. Mecham, Constance White, Clark Jones, Commissioners of the Public Service Commission of Utah's Motion to Dismiss filed pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. The matter came on for hearing on Monday, August 9, 1999. Sandy Mooy appeared for Defendants Public Service Commission of Utah and Stephen F. Mecham,

Public Service Commission of Utah. David Jordan appeared for Defendant U S West Communications Inc. Matthew Pachman appeared for Plaintiff MCI Telecommunications Corp. And MCI Metro Access Transmission Services, Inc. Daniel Waggoner appeared for Defendant AT&T Communications of the Mountain States, Inc. David Zaring appeared for the U.S. Department of Justice, Federal Programs Branch. Oral argument was heard and the matter was taken under advisement. The Court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The Court has further considered the law and facts relevant to the all motions. Now being fully advised, the court enters the following order.

I. BACKGROUND

In February 1996, Congress passed the Telecommunications Act of 1996 (The "ACT") which was intended to promote competition and reduce regulation in local telephone markets.

The ACT requires incumbent telephone carriers to allow new carriers access to certain equipment necessary to start or run a telephone company. To accomplish the designs of the ACT, Congress requires that all involved parties negotiate in good faith on the terms of an agreement that would meet the requirements of the ACT. If negotiations prove unsuccessful, either party has the option of requesting arbitration by the public service commission. If the public service commission declines to arbitrate, the Federal

Communications Commission (FCC) steps in. If either party is unhappy with the arbitration results, they may appeal to the appropriate federal district court for review of the arbitrator's findings.

On July 26, 1996, AT&T Communications of the Mountain States, Inc. (AT&T), filed a petition for arbitration with the Utah Public Service Commission (the "Commission") for arbitration with U S West Communications, Inc. ("U S West") pursuant to section 252(b) of the ACT. On September 3, 1996, MCI Metro Access Transmission Services, Inc. And MCI Telecommunications Corp.)"MCI") filed a petition for arbitration with the Commission for arbitration with U S West pursuant to section 252(b) of the Act. The Commission consolidated the AT&T and MCI petitions

for arbitration and proceeded.

On April 28, 1998, the Commission issued an Arbitration Order resolving a number of issues and requiring the parties to file fully executed interconnection agreements consistent with the Arbitration Order. Each of the parties filed separate, fully executed interconnection agreements with the Commission and sought reconsideration of a number of issues. On June 9, 1998, the Commission issued its Order on Reconsideration.

On July 9, 1998, U S West filed suit against AT&T, MCI, the individual Commissioners and the Commission seeking review of the Arbitration Order. Also on July 9, 1998, MCI filed suit against U S West, the individual Commissioners and the Commission. The

two suits were consolidated and the Commission filed this motion.

II. DISCUSSION

Jurisdiction over the Individual Commissioners

The Commission argues that the Eleventh Amendment to the United States Constitution bars this action against the individual Commissioners. They reason that since the Commissioners were acting in their official capacities, any suit against them should be brought against their employer the state. Because the state has immunity, the individual Commissioners are also protected. The Commission further argues that a recent United States Supreme Court decision *Alden v. Maine,* 119 S. Ct. 2240 (1999), so limits the Eleventh Amendment exception set forth in *Ex parte Young,* 113

S. Ct. 684 (1908), that the exception does not apply to the individual Commissioners in the present case.

A closer reading of *Alden* reveals that the Supreme Court did just the opposite. Instead of limiting the *Ex parte Young* doctrine, the Supreme Court emphasized its importance in modern jurisprudence. The Supreme Court stated, speaking of the limitation on sovereign immunity:

> Nor does sovereign immunity bar all suits against state officers. Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State. . . . The rule, however, does not bar certain actions

> against state officers for injunctive or declaratory relief. Compare *Ex parte Young*, 209 U.S. 123, 28S.Ct. 441, 52 L. Ed. 714 (1908). . . . Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.

Alden, 119 S.Ct at 2266.

This Court finds that the *Ex parte Young* doctrine applies in this case and the suit against the individual Commissioners may proceed.

Jurisdiction over the Commission

Congressional Power to Abrogate Eleventh Amendment Immunity Through Powers Granted by Article I

The Commission argues that the Supreme Court made it clear in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), that Congress did not have the power to abrogate Eleventh Amendment Immunity through the powers granted by Article I of the United States Constitution. However, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 119 S.Ct. 2219 (1999), the Supreme Court set forth a two pronged test to determine when Congress has the power to condition state participation in a federal program on the state's waiver of immunity. First, Congress must be under no obligation to give the right

to the state, and the state must not have a right to participate in the program -- the offer must be a gratuitous one. Second, the activity that Congress is conditioning the waiver on must not be an otherwise lawful or permissible activity. *College Savings Bank,* 119 S.Ct at 2231. Implicit in the previous test is Congress's clear expression that participation in the federal program will require waiver of Eleventh Amendment immunity.

This Court finds that the Commission did not have a pre-existing right to participate in the ACT and that Congress did not have a duty to allow such participation. Furthermore, this Court finds that the actions allowed under the ACT are not otherwise lawful or permissible activities for the Commission. Thus, the

Telecommunications Act of 1996 meets the test set forth in *College Savings Bank* and Congress has properly conditioned participation in the ACT upon waiver of Eleventh Amendment immunity.

The Commission's Waiver of its Eleventh Amendment Immunity

As outlined above, this Court finds that participation under the ACT necessarily requires a waiver of Eleventh Amendment immunity. Thus, this Court finds that the Commission has waived its Eleventh Amendment immunity.

Scope of Jurisdiction

The Commission argues that if this Court found

that the Commission has waived its immunity, this Court's jurisdiction should be limited to whether the arbitration ruling complied with the ACT. This Court does not dispute that its jurisdiction on all claims arising under the ACT are limited to the scope outlined by the ACT. However, U S West is claiming a violation of due process under the Fourteenth Amendment and 42 U.S.C. § 1983.

In *College Savings Bank*, Justice Scalia reiterated that the Fourteenth Amendment is superior to the Eleventh Amendment in that the Fourteenth Amendment can properly abrogate Eleventh Amendment immunity. *College Savings Bank*, 119 S.Ct. At 2223. U S West's taking claims are not brought under the ACT, but under the Fourteenth Amendment

and 42 U.S.C. §1983. These are the appropriate channels for such claims and this Court has the proper jurisdiction to hear them.

III. CONCLUSION

For the foregoing reasons, **DEFENDANTS UTAH PUBLIC SERVICE COMMISSION and STEPHEN F. MECHAM, CONSTANCE WHITE, CLARK JONES, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH'S MOTION TO DISMISS IS DENIED.**

Dated this 13th day of August, 1999.

BY THE COURT:

s Dale A. Kimball

United States District Judge

47 U.S.C. §251 *(in part)*

Interconnection.

(a) General Duty Of Telecommunications Carriers. – Each telecommunications carrier has a duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations Of All Local Exchange Carriers. – Each local exchange carriers has the following duties –

(1) Resale. – The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number Portability. – The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing Parity. – The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have

nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access To Rights-of-Way. – The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal Compensation. – The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional Obligations Of Incumbent Local Exchange Carriers. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty To Negotiate. – The duty to negotiate in good faith, in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. – The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point

withing the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions, that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled Access. – The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combing such elements in order to provide such telecommunications service.

(4) Resale. – The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or

limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice Of Changes. – The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. – The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocations is not practical for technical reasons or because of space limitations.

(d) Implementation. – . . .

47 U.S.C. §252

Procedures for Negotiation, Arbitration, and Approval of Agreements.

(a) Agreements Arrived At Through Negotiation. –

(1) Voluntary Negotiations. – Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a bi9nding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections 9b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection 9e) of this section.

(2) Mediation. – Any party negotiating an agreement under this section may , at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements Arrived At Through compulsory Arbitration. –

(1) Arbitration. – During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a

request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of Petitioner. –

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to Respond. – A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.

(4) Action By State Commission. –

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may

require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal To Negotiate. – The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards For Arbitration. – In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulation prescribed by the Commission

pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection 9d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement,

(d) Pricing Standards. –

(1) Interconnection and Network Element Charges. – Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges For Transport And Termination And Termination Of Traffic. –

(A) In General. – For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of Construction. – This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that wiave mutual recovery 9such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale Prices for Telecommunications services. – For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service

requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval By State Commission. –

(1) Approval Required. – Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement with written findings as to any deficiencies..

(2) Grounds For Rejecting. – The State commission may only reject –

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that –

(i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulation prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation Of Authority. – Notwithstanding paragraph (2), but subject to section

253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule For Decision. – If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or withing 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission To Act If State Will Not Act. – If a State commission fails to act or carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review Of State Commission Actions. – In a case in which a State fails to act as described in paragraph (50, the proceeding by the Commission under such paragraph and any judicial revie2w of the

Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination undr this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements Of Generally Available Terms. –

(1) In General. – A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State Commission Review. – A State commission may not approve such statement unless such statement complies with subsection 9d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule For Review. – The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any

reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority To Continue Review. – Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty To Negotiate Not Affected. – The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation Of State Proceedings. – Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing Required. – A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to

the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability To Other Telecommunications Carriers. – A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunication carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition Of Incumbent Exchange Carrier. – For purposes of this section, the term 'incumbent local exchange carrier' has the meaning provided in section 251(h).

47 U.S.C. §253

Removal Of Barriers To Entry.

(a) In General. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State And Local Government Authority. – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent

necessary to correct such violation or inconsistency.

(e) Commercial Mobile Service Providers. – Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

(f) Rural Markets. – It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply –

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

(2) to a provider of commercial mobile services.

Utah Code Ann. §54-8b-2.1

54-8b-2.2 Interconnection.

(1) (a) (i) The commission may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.

(ii) Interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic. In determining unreasonable blocking or unreasonable restrictions, the commission shall, among other things, take into account the necessity and time required for adapting the network to respond to significant changes in usage patterns.

(b) (i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on

terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

(c) Nothing in this section shall prevent a telecommunications corporation from entering into nondiscriminatory agreements for interconnection with its essential facilities and the purchase and sale of essential services.

(d) (i) A telecommunications corporation shall file with the commission the prices, terms, and conditions of any agreement it makes for the interconnection of essential facilities or the purchase or sale of essential services.

(ii) The agreement shall take effect ten days after filing.

(iii) Each telecommunications corporation shall allow any other telecommunications corporation to obtain interconnection with its essential facilities and to purchase essential services on prices, terms, and conditions no less favorable than those on file with the commission.

(e) If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.

(f) It is not a discriminatory pricing practice to vary prices to reflect genuine cost differences.

(2) (a) The commission shall adopt rules or issue an interim order which implements by December 31, 1996, the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or interim order shall address those issues the commission determines are essential for a competing telecommunications corporation to provide intraLATA toll and local exchange services and necessary to protect the public interest, including the interconnection with essential facilities and the purchase and sale of essential services of telecommunications corporations authorized to provide public telecommunications services in the same or overlapping service territories on a nondiscriminatory and reasonably unbundled basis.

(3) (a) By December 31, 1997, the commission shall adopt additional rules or issue a final order to implement the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or final order shall address other issues relating to:

(i) competition for intraLATA toll and local exchange services;

(ii) blocking, timing of provisioning of unbundled elements, and service quality standards for interconnecting carriers;

(iii) the transition to a competitive market; and

(iv) the protection of the public interest.

(4) Nothing in this section shall require or prohibit the commission from ordering changes in

dialing patterns for intraLATA toll services.

(5) If the commission, by order, approves the application of a telecommunications corporation to provide public telecommunications services in all or part of the service territory certificated to an incumbent telephone corporation before the adoption of the rules or final order described in Subsection (3), the commission may:

(a) order the interconnection of essential facilities and the purchase and sale of the essential services of a telecommunications corporation with those of a competing telecommunications corporation on such terms and conditions and to the extent necessary to allow the competing telecommunications corporation to operate under authority granted by the commission; and

(b) address and resolve, by order, other issues necessary for the competitive provision of intraLATA toll and local exchange services.

Utah Code Ann. §54-8b-2.2

54-8b-2.2 Interconnection.

(1) (a) (i) The commission may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.

(ii) Interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic. In determining unreasonable blocking or unreasonable restrictions, the commission shall, among other things, take into account the necessity and time required for adapting the network to respond to significant changes in usage patterns.

(b) (i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on

terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

(c) Nothing in this section shall prevent a telecommunications corporation from entering into nondiscriminatory agreements for interconnection with its essential facilities and the purchase and sale of essential services.

(d) (i) A telecommunications corporation shall file with the commission the prices, terms, and conditions of any agreement it makes for the interconnection of essential facilities or the purchase or sale of essential services.

(ii) The agreement shall take effect ten days after filing.

(iii) Each telecommunications corporation shall allow any other telecommunications corporation to obtain interconnection with its essential facilities and to purchase essential services on prices, terms, and conditions no less favorable than those on file with the commission.

(e) If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.

(f) It is not a discriminatory pricing practice to vary prices to reflect genuine cost differences.

(2) (a) The commission shall adopt rules or issue an interim order which implements by December 31, 1996, the competitive provision of facilities-based intraLATA toll and local exchange services.

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dialing patterns for intraLATA toll services.

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(a) order the interconnection of essential facilities and the purchase and sale of the essential services of a telecommunications corporation with those of a competing telecommunications corporation on such terms and conditions and to the extent necessary to allow the competing telecommunications corporation to operate under authority granted by the commission; and

(b) address and resolve, by order, other issues necessary for the competitive provision of intraLATA toll and local exchange services.

(2)

No. 00-593

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF UTAH, STEPHEN F. MECHAM, CONSTANCE B. WHITE, and CLARK D. JONES, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH,

Petitioners,

v.

QWEST CORPORATION, MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC. and AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc., states as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Transmission Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, Inc. is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc. is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns ten percent or more of WorldCom stock.

Pursuant to Rule 29.6, respondent Qwest Corporation states as follows:

U S WEST, Inc. merged with and into Qwest Communications International Inc. on June 30, 2000. Qwest Communications International Inc. is a publicly held corporation that has no parent company. Qwest Communications International Inc., through its operating subsidiaries, provides broadband Internet-based data, voice and image communications for businesses and consumers. No publicly held company owns ten percent or more of the stock of Qwest Communications International Inc.

U S WEST, Inc. was formerly the parent and sole shareholder of U S WEST Communications, Inc. U S WEST Communications, Inc. was renamed Qwest Corporation on July 6, 2000. Qwest Corporation is a wholly owned subsidiary of Qwest Communications International Inc. Qwest Corporation is a local exchange carrier that provides local exchange telecommunications, exchange access, information access, data services, wireless services and intraLATA long distance services pursuant to tariff and contract.

Pursuant to Rule 29.6, respondent AT&T Communications of the Mountain States states as follows:

AT&T Corp. is the parent of AT&T Communications of the Mountain States, and no other publicly held corporation owns ten percent of its stock.

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STATEMENT

Petitioners – the Public Service Commission of Utah and the members of that Commission – ask this Court to grant *review to determine the validity, under the Eleventh* Amendment, of a provision of the Telecommunications Act of 1996[1/] ("the Act" or "the 1996 Act") authorizing suits in federal court against state public utility commissions. Specifically, the Act provides that if state commissions agree to participate in the administration of a new federal scheme governing "interconnection" arrangements among competing local phone companies, their actions may be reviewed for compliance with the Act in federal district court. Petitioners did choose to participate in the Act's regulatory scheme, but then asserted an Eleventh Amendment defense to one of two ensuing federal lawsuits. The Tenth Circuit, in a ruling consistent with other circuit decisions interpreting the Act, affirmed the rejection of the Eleventh Amendment immunity claim, relying both on waiver and on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

1. Statutory Scheme. The 1996 Act fundamentally altered the balance between federal and state authority in telecommunications regulation. As part of a broad effort to promote competition wherever possible, Congress partially supplanted the existing system of state regulation of local service by imposing a new set of federal standards and procedures governing "interconnection" between incumbent local exchange carriers and potential competitors. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

In the Act, Congress preempted all state laws erecting barriers to entry into telecommunications markets. § 253(a). Then Congress created three specified routes for competitive

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[1] Codified at 47 U.S.C. § 157 *et seq.*

entry into local telephone markets to speed the introduction of competition. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new entrants on an unbundled basis. § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. § 251(c)(4). In each case, Congress prescribed specific federal standards governing the rates that the respective carriers charge each other for these services. §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards the Act established. 525 U.S. at 377-84 & n.5; § 201(b).

In the spirit of cooperative federalism, however, Congress also carved out a new, voluntary role for states. The Act requires incumbent local carriers to negotiate with new entrants to develop "interconnection agreements" specifying the terms of interconnection, access to network elements, and resale. § 251(c)(1). If the parties cannot arrive at a complete interconnection agreement through negotiation, however, the Act gives state utility commissions the authority (if they choose to exercise it) to convene compulsory "arbitrations" to set terms by applying the substantive provisions of the Act and the FCC's regulations. § 252(b), (c). Whether negotiated or arbitrated, the final interconnection agreement must be reviewed for compliance with the Act – with the state commissions playing that role as well if they choose to do so. § 252(e)(1).

The Act does not require state commissions to implement the new federal scheme. If a state commission declines to exercise the authority Congress offered to it in the Act, the FCC will assume those duties. § 252(e)(5). Whether carried out by the FCC or a state commission, however, final agency determinations regarding the terms of an interconnection agreement are subject to review in federal court for compliance with the Act. Determinations of the FCC are reviewed by a federal court of appeals under the Hobbs Act, 28 U.S.C. § 2342(1). If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 and" 252. § 252(e)(6). Moreover, the Act expressly precludes any state court review of state commission actions "approving or rejecting" interconnection agreements. § 252(e)(4). Accordingly, section 252(e)(6), reinforced by section 252(e)(4), clearly puts state commissions on notice that their actions in arbitrating disputes and approving interconnection agreements will be reviewable in federal court.

2. *Arbitration Proceedings.* In 1996, AT&T Communications of the Mountain States ("AT&T") and MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.) and MCImetro Access Transmission Services, Inc. (collectively, "MCI") each sought negotiation of the terms of separate interconnection agreements with Qwest Corporation ("Qwest") (formerly known as U S WEST Communications, Inc. or U S WEST). Both sets of negotiations reached an impasse.

Pursuant to section 252(b) of the Act, AT&T and MCI filed separate petitions with the Utah Public Service Commission ("PSC") in which they requested that the PSC

arbitrate the issues in dispute between them and Qwest. The PSC accepted and consolidated the petitions, and issued an arbitration order in which it resolved a number of open issues. After the parties filed fully executed interconnection agreements with the PSC, the PSC approved the interconnection agreements pursuant to § 252(e).

3. *District Court Proceedings*. Shortly after the PSC approved the interconnection agreements, MCI filed suit against Qwest and the PSC, alleging that it was aggrieved by several of the terms of the agreement between MCI and Qwest. At the same time, Qwest sued MCI, AT&T, and the PSC, challenging other provisions of its agreements with MCI and AT&T. In addition to challenging the interconnection agreement under the Act, the Qwest complaint included allegations that the PSC defendants had committed a violation of procedural due process and that the agreement would result in an unconstitutional taking. Qwest sought only declaratory and injunctive relief under all of its claims, including its constitutional claims. The district court consolidated the two suits, and the United States intervened.

Before the cases proceeded to an adjudication of the merits, the PSC defendants moved to have themselves dismissed from the case brought by Qwest on the ground that, under the Eleventh Amendment, the district court lacked jurisdiction over them. Significantly, however, the PSC defendants stipulated to the court's jurisdiction over them with respect to MCI's claims and therefore did not move to have themselves dismissed from the case brought by MCI. Pet. at 15. Petitioners explained this apparent inconsistency during the briefing of their immunity motion, stating that MCI had been willing to agree to limit the relief it sought to prospective relief, whereas Qwest's complaint, with its constitutional claims,

appeared to contemplate monetary relief. Reply Brief of Utah Public Service Commission and Individual Commissioners, at 2-3 (D. Utah filed April 9, 1999) ("As evidenced by the stipulation entered into by MCI and the Commission . . . , the Commission is certainly willing to proceed before this Court and have this Court fulfill its 47 U.S.C. § 252 review . . . when the State is not exposed to damages awards."). The PSC defendants also said that they did not object to an *Ex parte Young* action being brought by Qwest, because such an action "functionally achieves what the Commission believes this Court should do under a Section 252 review" and "would not expose the State to damage awards." *Id.* at 5. Although Qwest pointed out in its briefing and at oral argument that it was not seeking monetary relief, *see, e.g.*, U S WEST's Opposition to Supplemental Memorandum of the PSC and Individual Commissioners at 11 & n.6, petitioners continued to assert immunity under the Eleventh Amendment. It was only in later filings in the district court that they voiced any objection to lawsuits in federal court under section 252(e)(6) seeking prospective relief.

After the completion of extensive briefing, the district court determined that it had jurisdiction over the PSC defendants with respect to Qwest's claims and, on September 20, 1999, entered an order denying their motion to dismiss. Pet. App. 45a-58a. The court ruled that the individual Commissioners are subject to its jurisdiction pursuant to *Ex parte Young*, 209 U.S. 123 (1908), Pet. App. 51a-53a, and that the PSC had voluntarily waived its sovereign immunity in exchange for the right to participate in the administration of the Act. *Id.* at 54a-56a.

4. *Court of Appeals Decision.* The U.S. Court of Appeals for the Tenth Circuit affirmed the district court on both

grounds. First, relying on this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Tenth Circuit held that, while Congress could not abrogate Utah's sovereign immunity, Pet. App. 19a-20a, Utah consented to being subject to suit in federal court when it voluntarily chose to participate in the Act's regulatory scheme, Pet. App. 33a-34a ("[Section] 252 puts Utah on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252") (citing *College Savings*, 527 U.S. at 679-80). The Tenth Circuit explained that, rather than constituting an "exclusion from an otherwise lawful activity," this case involved a *gratuity* – participation in the Act's regulatory scheme – that Congress granted to states expressly conditioned on their willingness to consent to suit in federal court. Pet. App. 36a. The court rejected the PSC defendants' argument that the regulation of utilities is a police power traditionally reserved to the states because "the 1996 Act preempted state regulatory authority over some aspects of local phone service" pursuant to Congress's Article I powers. *Id.* at 35a (citing *AT&T Corp.*, 525 U.S. at 370 n.6). Indeed, the court noted, "Congress could have preempted *all* state regulation of local phone service" if it had chosen to do so. Pet. App. 35a (emphasis added).

Second, the Tenth Circuit held that the suit filed by Qwest was a proper *Ex parte Young* action, and that nothing in the Act precluded invocation of *Ex parte Young* as a basis for federal court review of the PSC's approval of the interconnection agreements at issue here.[2] *Id.* at 39a. It agreed with the Sixth

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[2] The Tenth Circuit rejected the PSC defendants' argument that the district court improperly rejected its motion to dismiss Qwest's takings claim as unripe. Pet. App. 42a. The panel "[found] no indication in the record that defendants made this argument to the district court. Moreover,

Circuit's statement in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000), that a lawsuit challenging a state commission's approval of an interconnection agreement is "a straightforward *Ex parte Young*" action, Pet. App. 39a. Noting that Qwest was simply seeking "declaratory and injunctive relief" from alleged "violations of federal law" by the defendant state officials, Pet. App. 40a n.8, the court summarily rejected the PSC defendants' contentions that either *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), imposed limitations on *Ex parte Young* that are relevant in this context, Pet. App. 39a-41a.

REASONS FOR DENYING THE PETITION

There are no conflicts among the circuits on any of the questions presented, and petitioners identify no independent reason justifying this Court's review. First, the Tenth Circuit's ruling on the *Ex parte Young* question is plainly correct, utterly uncertworthy, and fully dispositive -- at least as a practical matter -- of the issues raised here. Three circuits have now held that a lawsuit challenging approval of an interconnection agreement is properly brought against state public utility commissioners in federal court pursuant to *Ex parte Young* because (1) such a suit seeks prospective relief from an ongoing violation of federal law, and (2) nothing in the Act precludes reliance on *Ex parte Young*. There is no circuit split on this issue, and the cursory arguments against application of *Ex parte*

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the district court did not discuss ripeness in its memorandum order denying defendants' motion to dismiss." *Id.* The PSC has not sought review of this issue.

Young offered in the petition suggest no reason to second-guess the prevailing consensus.

Because this case could properly be brought under *Ex parte Young*, it follows that a decision by the Court on the two other questions presented by petitioner will have no practical impact on any party. At the most, a ruling that the Public Service Commission did not validly waive the Eleventh Amendment would require amendment of the caption of the case to limit the defendants to the commissioners in their official capacity. Given the Court's oft-expressed reluctance to review abstract issues of law, particularly where, as here, it will have no practical effect, this fact alone would be a sufficient basis to deny review altogether. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In any event, on their own terms, the waiver-related questions presented are not worthy of review. Petitioners claim that the federal courts are in disarray on the question whether, under the standards established in *College Savings*, states consent to review in federal court when they voluntarily participate in administering the 1996 Act's regulatory scheme. In fact, the only two circuit court rulings that have decided the issue – the ruling below and a ruling of the Seventh Circuit – have held that states do consent to federal jurisdiction, and thereby waive their immunity, by choosing to participate in the Act's scheme with clear notice that their choice will subject them to federal judicial review. Moreover, those rulings are fully consistent with *College Savings*; it is well within Congress's power to preempt state regulation of interstate commerce and then condition the states' voluntary participation in the new federal regulatory regime on consent to federal court review and a waiver of the Eleventh Amendment. But even if that were not so clearly the case, review still would not be

warranted. The Court's practice, "borne out time and again in [its] decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents – even one deemed arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals." *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting, joined by O'Connor, J., and Souter, J.).

I. The Tenth Circuit's Reliance on *Ex parte Young* Does Not Warrant Review.

Petitioners' arguments for review by this Court are severely undermined by their inability to make a plausible case for review of the *Ex parte Young* issue set forth in the third Question Presented. The reality is that three circuits are now on record holding that a case like this one is a "straightforward *Ex parte Young* case." *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d at 867; *see* Pet. App. 39a (case below); *MCI Telecommuncations Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 346 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653).[3] As those courts have recognized, there is no basis for

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[3] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to § 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Communications*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications. of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *U S WEST Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d 1279 (N.D. Fla.

petitioners' argument that *Seminole Tribe* somehow precludes reliance on *Ex parte Young* here because of some supposed inconsistency between *Ex parte Young* and the language of 252(e)(6). Given the weakness of that argument, and the prevailing unanimity among the circuits, it is not surprising that the Court has twice denied review on this precise question during this Term.[4] There is no reason to change course now.

The Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials, seeking prospective relief from ongoing violations of federal law, is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 269; *id.* at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting). These standards are plainly met here. Indeed, this Court has often recognized that *Ex parte Young* provides a proper vehicle for federal-court review of state commission decisions. *E.g., Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (referring to the "many cases prior to and following *Ex parte Young* . . . in which this Court has granted . . . relief"); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908).

1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *U S WEST Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *U S WEST Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

[4] *Strand v. Michigan Bell Tel.* (cert. denied Oct. 2, 2000); *Strand v. Verizon North*, 121 S. Ct. 389 (cert. denied Oct. 30, 2000).

Thus, petitioners are left with the option of trying to make this case look like *Seminole Tribe*. In fact, however, there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. § 252(e)(6). That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court found that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it implicitly prohibited a court from enforcing its own order with contempt sanctions, as it normally would have the power to do. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available under IGRA and an *Ex parte Young* action, where the typical remedy is an injunction and contempt sanctions are available.

Here, nothing in section 252 of the Act limits federal court review in a remotely comparable manner. *See MCI Telecommunications Corp.*, 222 F.3d at 346. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e) only realizes Congress's intent to vest federal courts with jurisdiction to address ongoing violations of federal law by state

officials. Indeed, unlike the IGRA, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

Seminole Tribe also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, the Act does not require that actions be brought against "the state," or contain any language suggesting an intent to preclude suits against the commissioners; it simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended for such suits to be brought on that basis. Moreover, the term "state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. § 153(41). Contrary to petitioners' claims, Pet. at 28-29, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

In sum, there is no reason for the Court to second-guess the Tenth Circuit's reliance on *Ex parte Young*.[5] That, in turn, is by itself a sufficient reason to deny review on all the questions presented in this case. Where a case can be decided on a ground that is relatively simple and non-controversial, this Court's practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, particularly if they would not affect the outcome of the case. *See, e.g., The Monrosa*, 359 U.S. at 184 ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").[6] *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 4.4, 172-73 (7th ed. 1993) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (cases cited). Here, the *only* impact of a reversal as to questions 2 and 3 would be to require deletion from the caption of the Utah Commission as a

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[5] Petitioners also refer to dicta in *Coeur d'Alene* to assert that this Court has "cautioned against" applying *Ex parte Young* to cases like this one. Pet. at 29. However, the Court there recognized that the "*Young* exception" has been "an important part of [its] jurisprudence," 521 U.S. at 269, and that the circumstance before it was "unusual" because the relief that the plaintiff Tribe sought was akin to "a quiet title action which implicated special sovereignty interests," *id.* at 281.

[6] In *The Monrosa*, the Court granted review to address the enforceability of a forum selection clause in a bill of lading. Having determined, however, that the case could be resolved on the alternative ground that the clause at issue did not cover actions *in rem*, the Court declined to address the enforceability issue. 359 U.S. at 184.

body, as the case then proceeded against the Commissioners under *Ex parte Young*. For that reason, the Court should decline to review these issues, which would remain purely "academic" -- at least as a practical matter -- unless and until the Court also overturned the Tenth Circuit's *Ex parte Young* ruling.

II. The Waiver Issue, Even On Its Own, Does Not Warrant Review.

Even if the issue were squarely presented here in a non-abstract way, there would be no persuasive reason for the Court to review the Tenth Circuit's ruling that state commissions consent to suit in federal court when they choose to review interconnection agreements under the Act. Here again, although petitioners claim that the federal courts are in disarray on this question, the Seventh Circuit – the only other court of appeals to have addressed the question – is in agreement with the Tenth Circuit. *MCI Telecommunications Corp.*, 222 F.3d at 345.[7]

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[7] Petitioners cite only two rulings of courts of appeals in support of their claim of disarray on this issue. Pet. at 17. The first, *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998), was later modified to account for *College Savings*, *see* 204 F.3d 601 (5th Cir. 1998), and did not involve the Telecommunications Act or any comparable federal program in which Congress invited state participation. Instead, the Fifth Circuit dealt with the question of states' authority to *abrogate* Eleventh Amendment immunity under the Fourteenth Amendment. In the second case, *GTE North, Inc. v. Strand*, 209 F.2d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), the only reference to the Eleventh Amendment is pure and acknowledged dicta in a footnote. *See id.* at 922 n.6. The state commission, as a corporate entity, was not even a defendant in *Strand* and the Sixth Circuit determined that the waiver issue was not presented because *Ex parte Young* applied.

Moreover, both circuits have faithfully followed this Court's teachings in *College Savings*.[8]

In *College Savings*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that

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[8] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states consent to suit in federal court when they voluntarily participate in the Act's regulatory scheme. *See, e.g., Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *U S West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *U S West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

Petitioners cite three district court opinions to support their claim that the courts are divided on this question. Pet. at 18 (citing *Wisconsin Bell v. Public Service Comm'n of Wisconsin*, 57 F. Supp. 2d 710 (W.D. Wis. 1999); *Bell Atlantic-Maryland v. MFS Intelenet of Maryland, Inc.*, Civil No. 599-2061, 1999 U.S. Dist. LEXIS 16477 (D. Md. Oct. 20, 1999); *AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecommunications*, 43 F. Supp. 2d 593 (M.D. La. 1999)). But the first was reversed by the Seventh Circuit. *See MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) (reviewing consolidated appeals), *petition for cert filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653). The other two are wholly unpersuasive because they failed to recognize that Congress could have preempted the entire field of local competition and denied states any role in this "new federal regime." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378 n.6. As the vast majority of federal court rulings have recognized, Congress acted properly by permitting (but not requiring) states to participate in this federal program, conditioned on consent to federal court review.

such a waiver must be clear and voluntary. 527 U.S. at 679. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing "otherwise permissible" state activity (such as operating a railroad or a college tuition savings plan) to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court created an irrebuttable presumption that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it ruled that states do validly waive immunity when they knowingly accept a gratuitous federal benefit expressly tied to a waiver. To illustrate the point, the Court distinguished two important cases in which it upheld statutory conditions placed on states by Congress. *Id.* at 686-87. The Court observed that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that

South Dakota v. Dole, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of fund to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their rights in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687. *See also Alden v. Maine*, 527 U.S. at 755 ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.").

Here, the Tenth Circuit tracked the Court's discussion of *Dole* and *Petty* in holding that the PSC voluntarily waived its sovereign immunity when the PSC arbitrated the interconnection dispute at the core of this case with clear notice that its action would subject it to federal court review. Pet. App. 29a-31a, 36a-38a. It held that, "[a]s in *Petty* and *Dole*," Congress has "no obligation to allow states to participate in the Act's regulatory scheme." *Id.* at 36a. Congress is just "conditioning a state's ability to regulate" in the areas covered by the Act on being "subject to suit in federal court." *Id.* at 37a-38a.

Petitioners claim that the Act "demands" that states waive their constitutionally protected sovereign immunity. Pet. at 21. They are wrong. Petitioners *voluntarily* accepted Congress's invitation to superintend agreements which are otherwise regulated by the FCC when they "resolved the disputes,"

"directed the parties to prepare interconnection agreements," and "then reviewed and approved the submitted interconnection agreements" in accordance with the Act. Pet. at 14. They certainly were not coerced by a threat of being barred from engaging in an "otherwise lawful activity." Petitioners' participation in the administration of the Act – a "new federal regime," *AT&T Corp.*, 525 U.S. at 378 n.6 – was a "gratuity" that Congress was free to grant (or withhold) at its pleasure. Likewise, the PSC was free to decline that gift and preserve its immunity. The Seventh Circuit, the only other court of appeals to have entered judgment on this question, is in lock-step with the Tenth Circuit on this question. *See MCI Telecommunications Corp.*, 222 F.3d at 345 ("We therefore conclude that the 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court.") (citing decision below).

Nonetheless, petitioners argue that, in arbitrating the disputes among the private parties in this case, it was exercising Utah's traditional police powers to regulate utilities. Pet. at 22. They therefore attempt to frame the question as whether Congress can condition a state's exercise of its police power on exposure to suit in federal court. That position is irreconcilable with this Court's decision in *AT&T Corp.*, which held that the state's traditional powers are preempted where the specific requirements of the Act apply. As the Court noted:

> [T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

525 U.S. at 378 n.6. For that reason, the Court added, "there is no doubt . . . that if federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*

Petitioners argue that the PSC's role in overseeing interconnection under the Act is merely a continuation of the PSC's historic role in regulating intrastate telecommunications. But the prior existence of Utah laws pertaining to interconnection between local telephone carriers or other regulation of local telephone companies is beside the point. In areas covered by the Act, the governing standards now represent a "new federal regime" in which state commission participation is to be guided by federal law. *Id.* State laws may only apply to the extent they supplement and are consistent with the Act. §§ 252(e)(3), 253.[9]

Moreover, the Act's preemption of inconsistent state law is a *given*, regardless of whether a state chooses to participate in administering the Act's federal standards. *See* § 253(d). Petitioner's argument that the state retains ultimate regulatory authority over interconnection agreements is, therefore, simply without merit. Here again, the Seventh Circuit, the only other court of appeals to have considered the question, is in agreement. *MCI Telecommunications Corp.*, 222 F.3d at 343

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[9] The local competition provisions of the Act concern only one narrow (albeit important) slice of regulation: the terms and conditions of interconnection *between competing phone companies*. *See Puerto Rico Tel. Co. v. Telecommuncations Regulatory Board of Puerto Rico*, 189 F.3d 1, 8, 12-13 (1st Cir. 1999). States, therefore, retain the regulatory powers over local telephone service that they may choose to exercise outside the sphere of interconnection agreements, including any power under state law to regulate the terms and conditions under which telephone companies offer local service to subscribers. *See* § 253(b); *Puerto Rico Tel.*, 189 F.3d at 12.

("It is clear that Congress, in exercising its Commerce Power, could determine that all regulation of the telecommunications industry ought to be entrusted to the federal government. And with the 1996 Telecommunications Act, we believe it equally clear that Congress did take over some aspects of the telecommunications industry.") (citations omitted).

Having chosen to impose federal standards and procedures, Congress also was within its rights in offering states the chance to participate as regulators only if they agreed to apply the federal standards and procedures. Under the Tenth Amendment, that is a choice Congress can impose, even in matters previously subjected to state police-power regulation. *See FERC v. Mississippi*, 456 U.S. 742, 761-71 (1982) (utility regulation); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981) (land use). The only question presented here is whether Congress may also make the perfectly reasonable decision that states choosing to participate should have their compliance with federal law reviewed in federal court. *College Savings*, far from precluding that decision, directly authorizes it.[10]

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[10] Even if the Court were inclined to review the questions presented, this case would not be an ideal candidate. As discussed above, the PSC defendants' legal position has been far from consistent. Indeed, they stipulated that MCI, one of the two plaintiffs in consolidated cases, could sue them in federal court *See* pp. 4-5 *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-593

In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF UTAH, ET AL., PETITIONERS

v.

US WEST COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbent carriers' network elements. The Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state public utility commission's voluntary acceptance of Congress's offer to exercise regulatory authority pursuant to the scheme set forth in the 1996 Act constitutes a waiver of immunity from suit in federal court, where the Act clearly provides for review in federal court of a state commission's actions.

2. Whether, in the alternative, the commissioners of a state public utility commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking prospective injunctive relief from orders by the state commission alleged to violate federal law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-43) is reported at 216 F.3d 929.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2000. The petition for a writ of certiorari was filed on September 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition."

H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case concerns the provisions of the 1996 Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions. What remained of AT&T continued to provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable, even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the existing network, a prospective competitor could not gradually enter the

market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Accordingly, Congress, in Section 251 of the 1996 Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2).[1] Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way, in order to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration in the event that the parties cannot

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[1] All citations of the 1996 Act are of Supp. IV 1998.

conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(e)(6).

b. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and regulations promulgated pursuant to the Act), and exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the Federal Communications Commission (FCC) will perform that role. 47 U.S.C. 252(e)(5).

Under the 1996 Act, the extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbitrated. A negotiated agreements is subject to review by the state commission (or, if the state commission chooses not to regulate, by the FCC) to determine whether the agreement discriminates against non-party carriers and is consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state public utility commission (or, if the state commission chooses not to regulate, the FCC) will resolve any open issue, including the rates, terms, and conditions under which competitors will enter the local market, as well as prices that the incumbent and the new entrant will pay one another for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). An arbitrated agreement is subject to

review by the state commission to determine whether the agreement complies with Sections 251 and 252 of the 1996 Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission approving or rejecting an interconnection agreement may file suit in federal district court for a determination "whether the agreement * * * meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the State has assumed the regulatory role, the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), authorizes federal appellate court review of the FCC's orders.

2. The Public Service Commission of Utah (UPSC) has voluntarily exercised regulatory authority under the 1996 Act. After new entrants AT&T and MCI failed to reach agreement with incumbent carrier US West on certain interconnection issues, the UPSC resolved disputed issues and issued an arbitration order directing the parties to file executed interconnection agreements consistent with its order. The UPSC then approved the submitted interconnection agreements under Section 252(e).

Various parties sought review of the UPSC's order approving the interconnection agreements. Acting pursuant to Section 252(e)(6), US West and MCI filed suit in federal district court against each other, the UPSC, and the individual commissioners of the UPSC seeking review of the UPSC's actions.

The UPSC and its individual commissioners moved to dismiss on the ground that the Eleventh Amendment

barred suit against them in federal court. The United States and the FCC intervened to defend the constitutionality of the 1996 Act. The district court denied the motion to dismiss. Pet. App. 45-58. The court held that the State, through the UPSC, had waived its sovereign immunity from suit under the Act by voluntarily engaging in the regulation of interconnection agreements, see *id.* at 54-56, and that the commissioners of the UPSC were amenable to suit under the exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), see Pet. App. 45-53.

3. The Tenth Circuit affirmed. The court of appeals held that "Utah voluntarily waived its sovereign immunity when the UPSC, through its commissioners, arbitrated the interconnection dispute in this case." Pet. App. 37-38. In the alternative, the court held that "[e]ven if the Eleventh Amendment barred US West's suit against the UPSC, US West still could proceed with suit against the individual commissioners" because such a suit is a "straightforward *Ex parte Young* case." *Id.* at 39.

a. Turning first to the question of waiver, the Tenth Circuit noted that a State may waive its Eleventh Amendment immunity in one of two ways: by voluntarily invoking the jurisdiction of a federal court or by making a "clear declaration" of consent to be sued in federal court. Pet. App. 21-22. Because the UPSC had not invoked the jurisdiction of a federal court and had not expressly consented to suit through a statute or constitutional provision, the court focused exclusively on the question "whether, under *College Savings Bank* [v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)], Utah constructively waived its immunity from suit when it arbitrated an intercon-

nection dispute between US West, AT&T and MCI pursuant to § 252 of the Act." Pet. App. 23-24.

While recognizing that *College Savings Bank* overruled the "forced" waiver doctrine—whereby a State was deemed to have waived its immunity merely by participating in activities governed by various federal statutes—the Tenth Circuit noted that *College Savings Bank* did not eliminate all forms of implied waivers. The court explained that such a waiver is valid if it is "altogether voluntary and not forced from a state by Congress." Pet. App. 29. The court emphasized that a waiver is voluntary "where Congress threatens a state with the denial of a 'gift or gratuity' if the state refuses to consent to suit in federal court"; where Congress threatens a state with a "sanction," however, "then the waiver is no longer freely given." *Ibid.*

The court of appeals next explained that *College Savings Bank*, in its references to *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), recognized the kinds of conditions that Congress may still place on States. Pet. App. 29-30. In those cases, the court noted, Congress conditioned a grant to which a State was not otherwise entitled (federal funds in *Dole* and the authority to enter an interstate compact in *Petty*) upon the State's acceptance of certain conditions that Congress could not otherwise have mandated (a lower drinking age in *Dole*, and a waiver of Eleventh Amendment immunity in *Petty*). *Id.* at 30. In contrast, the court explained, in both *Parden* and *College Savings Bank* "Congress threatened a sanction: 'exclusion of the State from otherwise permissible activity.'" *Id.* at 31.

In analyzing the 1996 Act under the principles derived from *College Savings Bank*, the court of appeals

found that "Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity." Pet. App. 33. The court noted, however, that "Congress's intent to effect a waiver is insufficient, standing alone, to render a state's waiver altogether voluntary." *Id.* at 34. Thus, the court explained, "Utah has voluntarily waived its immunity only if Congress, through the 1996 Act, threatened it with the denial of a gratuity, rather than the imposition of a sanction." *Ibid.*

While acknowledging that "states were permitted to regulate local phone service" before 1996, the court of appeals noted that, "with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity." Pet. App. 34, 36. "As in *Petty* and *Dole*," the court explained, "Congress was under no obligation to allow states to participate in the Act's regulatory scheme." *Id.* at 36. Thus, the court reasoned, "by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity." *Ibid.*[2]

b. In the alternative, the court of appeals held that suit could proceed against the commissioners of the UPSC under *Ex parte Young*. Pet. App. 39. Citing the Sixth Circuit's holding on that question in *Michigan*

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[2] In response to the UPSC's argument that the 1996 Act imposes a "sanction" rather than a gratuity upon the State by excluding it from regulating interconnection agreements if it elects not to waive its immunity, the court of appeals noted that "§ 252 removes only a slice of regulatory authority from a state if it declines to waive its sovereign immunity." Pet. App. 36-37 n.6.

Bell Telephone Co. v. *Climax Telephone Co.*, 202 F.3d 862, cert. denied, 121 S. Ct. 54 (2000), the court of appeals noted that the case before it was "a straightforward *Ex parte Young* case." Pet. App. 39. The court rejected the UPSC's argument that *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), "narrowed the *Ex parte Young* doctrine so as to make it inapplicable to this case." Pet. App. 40 n.8. While acknowledging that courts must examine whether the relief requested under *Ex parte Young* implicates "special sovereignty interests," the court held that the declaratory and injunctive relief requested under the 1996 Act "would not affect any special sovereignty interests or otherwise cause offense to Utah's sovereign authority." *Ibid.*

ARGUMENT

The Tenth Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, to the extent that other courts of appeals have considered the issues presented in this case, they have reached the same conclusions as did the Tenth Circuit. See *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) (finding no Eleventh Amendment bar on both waiver and *Ex parte Young* grounds), petitions for cert. pending, Nos. 00-653, 00-744; *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.) (basing decision solely on *Ex parte Young*), cert. denied, 121 S. Ct. 54 (2000).[3] This Court's review is therefore not warranted.

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[3] Petitioners contend (Pet. 18 & n.10) that there is a "split between the federal courts" on the question of implied waiver of immunity under the 1996 Act, but petitioners cite only district court decisions in which appeals on that issue are pending. Although the Sixth Circuit stated in a footnote that the 1996 Act

1. The court of appeals correctly held that state public utility commissions waive their immunity from suit in federal court by voluntarily accepting Congress's offer to exercise federal regulatory authority pursuant to the scheme established by the 1996 Act to promote competition in local telecommunications markets. The Act provides that a regulatory body will exercise authority, subject to review in federal court, over agreements between incumbent carriers and new entrants pursuant to the Act (*i.e.*, agreements concerning interconnection, access to network elements, resale of services, etc.). See 47 U.S.C. 251, 252. If that responsibility is undertaken by the FCC, pursuant to 47 U.S.C. 252(e)(5), the FCC's actions are reviewable in a federal court of appeals, as provided in the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998). If, in the alternative, a state commission accepts Congress's offer of regulatory authority under the Act, the State commission does so with full knowledge that the Act permits aggrieved parties to seek "[r]eview of State commission actions" in federal district court. 47 U.S.C. 252(e)(6). Thus, the 1996 Act clearly puts the States on notice that, if they elect to participate in the federal regulatory scheme, they will do so subject to review of their actions in federal court.[4]

"cannot legitimately be construed as a valid waiver of sovereign immunity," *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 922 n.6, cert. denied, 121 S. Ct. 380 (2000), the court's mention of waiver in that case was plainly dicta because review was permitted under *Ex parte Young*. A waiver theory was never briefed or argued in that case because the district court's jurisdiction over the preemption claim was based solely on 28 U.S.C. 1331, not Section 252(e)(6).

[4] Notably, petitioners do not contend that the 1996 Act lacks sufficient clarity to put States on notice that their regulation of

The Tenth Circuit's decision that States waive their Eleventh Amendment immunity by assuming a regulatory role under the 1996 Act is fully consistent with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). *College Savings Bank* does not suggest that Congress cannot condition a State's exercise of regulatory authority under a federal statute—authority that would otherwise be exercised by a federal agency, subject to review in federal court—on the State's amenability to review of its exercise of that regulatory authority in federal court. To the contrary, *College Savings Bank* confirms that Congress's ability to impose conditions on a State's voluntary exercise of federal authority is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964). See 527 U.S. at 675-687.[5]

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interconnection agreements under Sections 251 and 252 is reviewable in federal court.

[5] The *Parden* doctrine applied when a State took part, as would a private party, in federally regulated activity and thereby became subject to controlling federal law. Thus, under the *Parden* doctrine, States that engaged in enterprises governed by federal statutes—such as the Lanham Act or the Patent Act—were viewed as having consented voluntarily to suit under those statutes. As Justice Scalia suggested as early as his dissent in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 41-45 (1989) (Scalia, J., dissenting in part), *Parden* waivers accomplished the same result as a federal abrogation of state immunity for actions in a regulated area. Once the Court overruled *Union Gas*, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and declared Congress without authority to abrogate immunity under its Article I powers, the *Parden* doctrine lost vitality. As this Court explained in *College Savings Bank*, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." 527

College Savings Bank makes clear, as the Tenth Circuit and numerous other courts of appeals have recognized, that a State may constructively waive its immunity in certain contexts.[6] In particular, the Court reaffirmed its holding in *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that "a bistate commission which had been created pursuant to an interstate compact * * * had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Sav. Bank*, 527 U.S. at 686. The Court explained that, in *Petty*, Congress was simply imposing a condition on a grant of authority that the State would not otherwise possess, because States cannot form interstate compacts without obtaining congressional approval. In that sense, Congress's action in *Petty* was a "gratuity" in the same sense as the disbursement of federal funds, a context in which it is well established that Congress may condition state participation on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

As in *Petty* and *Dole*, this case involves a condition imposed on a "gratuity"—which a State may freely choose to accept or reject—in the same sense as the conditional grant of congressional approval of the inter-

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U.S. at 683. Accordingly, because Congress could not abrogate States' sovereign immunity for violations of the Lanham Act, neither would a State be held to have impliedly waived its immunity by engaging in conduct subject to that Act.

[6] See *Sandoval* v. *Hagan*, 197 F.3d 484, 494 (11th Cir. 1999) (finding waiver of immunity based on acceptance of federal funds), cert. granted on other grounds *sub nom. Alexander* v. *Sandoval*, 121 S. Ct. 28 (2000); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 566 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1220 (2000); *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281 (10th Cir. 1999) (same), cert. denied, 120 S. Ct. 1530 (2000).

state compact in *Petty*. As the Court observed in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6. Congress allowed the States to play a role in that regulation, but it has conditioned that role on federal judicial review to ensure compliance with the new federal standards. Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the Act does not allow the States simply "to do their own thing," and "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Ibid.*[7]

Petitioners contend (Pet. 22) that state commissions cannot be deemed to have waived their Eleventh Amendment immunity, because the authority to regulate interconnection agreements cannot properly be viewed as a "gratuity" within the meaning of *College Savings Bank*. Petitioners' contention reflects a fundamental misunderstanding of the changes wrought by the 1996 Act. As the court of appeals recognized (Pet. App. 35-36), Congress could, and did, take over certain

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[7] The question whether the Eleventh Amendment protects States from suit under the Act was not at issue in *Iowa Utilities Board*. Nor is that question presented in the pending petitions for a writ of certiorari arising from the Eighth Circuit's decision on remand in *Iowa Utilities Board*. Those petitions instead involve the rules promulgated by the FCC to implement the substantive requirements of Section 251(c). See *Verizon Communications, Inc.* v. *FCC* (No. 00-511); *WorldCom, Inc.* v. *Verizon Communications, Inc.* (No. 00-555); *FCC* v. *Iowa Utils. Bd.* (No. 00-587); *AT&T* v. *Iowa Utils. Bd.* (No. 00-590); *General Communications, Inc.* v. *Iowa Utils. Bd.* (No. 00-602).

aspects of local telecommunications regulation from the States. Far from preserving the status quo, the Act imposed a new federal regulatory scheme on local telecommunications markets; the States were permitted to continue to regulate in the areas encompassed by the Act only to the extent consistent with the Act and implementing FCC regulations. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. The Act thus reflects the general principle that Congress may preempt the States from regulating in an area of federal concern and may condition the States' continued regulation in that area on adherence to provisions of federal law. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Emphasizing that "Utah law had already required telecommunications companies to interconnect their networks and provide reciprocal access to their networks' facilities and services" before the 1996 Act, petitioners contend (Pet. 23 & n.11) that "[t]he source of the states' police power does not derive from a congressional gratuity." But the existence of prior state regulation in the area now covered by Sections 251 and 252 is irrelevant to whether the new regulatory authority granted to the States by the Act is a gratuity. While the Act permits States to regulate in that area, the Act confers that authority as part of the new federal scheme. Indeed, by citing various provisions of the Act that allegedly authorize the States to exercise their "traditional police power" in that area (Pet. 24), petitioners only emphasize that the authority to regulate interconnection agreements now flows exclusively from the Act.[8]

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[8] To be sure, while Congress has "taken the regulation of local telecommunications competition away from the States" with re-

In sum, it is the 1996 Act, not state law, that provides new entrants with the core rights to interconnect with an incumbent carrier's network, to lease elements of the incumbent's network, and to purchase services of the incumbent's network for resale. It is the 1996 Act, not state law, that provides for incumbents and new entrants to enter into agreements implementing those rights, either through negotiation between themselves or through arbitration under the auspices of a regulatory body. It is the 1996 Act, and the regulations promulgated by the FCC under that Act, that contain the basic principles governing the rates, terms, and conditions in such agreements. Thus, the regulation of interconnection agreements, as creatures of federal law, is not an "otherwise permissible activity" under *College Savings Bank*. Instead, such regulation is akin to a "gratuity" that Congress may offer with conditions attached. States remain free to accept or reject the regulatory role that Congress has offered to them under the Act. But States cannot choose to participate in the regulatory scheme established under the Act

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spect to "matters addressed by the 1996 Act," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, Congress has not taken over the regulation of all aspects of local telecommunications. And Congress preserved the ability of the States to supplement federal requirements with requirements of their own, so long as they are consistent with the Act and any rules promulgated thereunder by the FCC. See 47 U.S.C. 251(d)(3), 261(b) and (c). But the fact that Congress did not supplant state regulation in every possible respect does not undermine the court of appeals' waiver analysis; the court held that the States waived their sovereign immunity from suit in federal court only with respect to those matters in which Congress *has* supplanted state regulation.

while simultaneously rejecting the federal judicial review that is a critical part of the regulatory scheme.[9]

2. The court of appeals' independent basis for decision—that the *Ex parte Young* exception to the doctrine of sovereign immunity permits suit for prospective relief against the commissioners of the UPSC (Pet. App. 39-41)—is also correct and in accord with the decisions of the only courts of appeals that have addressed the issue. See *Illinois Bell*, 222 F.3d at 345; *Michigan Bell*, 202 F.3d at 867. Indeed, this Court has already denied petitions for certiorari in two cases raising the precise arguments against *Ex parte Young* review that petitioners present here. See *Strand* v. *Michigan Bell Tel. Co.*, 121 S. Ct. 54 (2000) (No. 99-1878); *Strand* v. *Verizon North Inc.*, 121 S. Ct. 380 (2000) (No. 00-101). No different result is warranted in this case.[10]

This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not preclude a suit that seeks injunctive relief against individual state officials to assure their prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123 (1908); see also *Pennhurst State*

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[9] Petitioners contend (Pet. 25) that it would be anomalous to conclude that the Eleventh Amendment precludes suit "when a state acts like an ordinary market participant" but not "where a state acts as a sovereign." But that asserted anomaly depends on petitioners' flawed understanding of the source of state regulatory authority under the 1996 Act—as a function of state sovereignty rather than a gratuity from Congress conditioned upon amenability to review of state commission actions in federal court.

[10] Petitioners acknowledge (Pet. 26 n.13) that the issues raised in the *Ex parte Young* portion of their petition "are identical or similar to" the issues raised in the cases that the Court has already declined to review.

Sch. & Hosp. v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 102 (1984); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* exception to state sovereign immunity is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst II*, 465 U.S. at 105; accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).[11]

The court of appeals correctly held that suits seeking prospective injunctive relief under the 1996 Act are permitted under *Ex parte Young*. In naming the commissioners of the UPSC as parties in a suit seeking review of the UPSC's determinations under Section 252(e)(6), the parties seek to have the commissioners conform their future actions with federal law. That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276-277 (Kennedy, J.) (observing that *Ex parte Young* and its progeny teach that "where prospective relief is sought against individual state officers in a federal forum based on a federal

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[11] There can be no doubt that *Ex parte Young* is not limited to suits alleging *constitutional* violations. The exception applies equally where the state official's conduct is alleged to violate a federal statute. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 n.6 (1978); see also *Edelman* v. *Jordan*, 415 U.S. 651, 665-671 (1974) (presupposing same). Otherwise, *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Coeur d'Alene Tribe*, two cases on which petitioners rely, could have been disposed of on much simpler grounds, as neither case involved an alleged federal constitutional violation.

right, the Eleventh Amendment, in most cases, is not a bar").[12]

Petitioners argue principally (Pet. 27-29) that the *Ex parte Young* exception is unavailable in this case because such review is improper under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).[13] But *Seminole Tribe* involved what the Court described as a "carefully crafted and intricate remedial scheme" that made only a "modest set of sanctions" available to aggrieved parties in federal court. *Id.* at 73-75. Here, in contrast, Congress did not similarly restrict the remedies available in federal court to parties aggrieved by actions of state commissions under the 1996 Act.

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, that established a framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith was an order directing

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[12] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether *Ex parte Young* relief is available against state officials is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

[13] Petitioners also briefly assert (Pet. 29) that the Tenth Circuit's decision is wrong because it "permits anticipatory pleading to transform what is otherwise a request to review a past administrative agency decision into an *Ex parte Young* proceeding in federal court." But the effects of the UPSC's decision are ongoing and thus subject to review under *Ex parte Young*. Indeed, as the Fourth Circuit has explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir.), cert. denied, 525 U.S. 821 (1998).

the State to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then prescribe regulations. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal courts to provide, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that the Tribes could not seek to enforce their IGRA rights in actions against state officials under *Ex parte Young*, because such actions would enable the Tribes to obtain more expansive remedies than Congress intended to provide in IGRA. *Id.* at 74-76.[14]

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the 1996 Act. In contrast to the statute in *Seminole Tribe*, the

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[14] As noted in the text, the Court's focus in *Seminole Tribe* was on the "carefully crafted and intricate" statutory scheme governing the remedies available once the dispute reached federal court. The Court concluded that, because Congress had specified only a "modest set of sanctions" to be imposed in federal court, Congress did not intend that additional remedies be available under *Ex parte Young*. See 517 U.S. at 74-76. That reasoning does not apply where, as under the 1996 Act, Congress has not restricted the remedies available in federal court. It is thus irrelevant whether the regulatory process, which precedes the judicial process provided for under the Act, might itself be characterized as "carefully crafted and intricate."

1996 Act does not narrowly circumscribe the remedies available in federal court to parties challenging the orders of state public utility commissions with respect to interconnection agreements. The Act provides for a process of negotiation between the parties, followed by arbitration, if necessary, by the state commission, and state commission review of the ultimate agreement. See 47 U.S.C. 252(a)-(e)(5). Once an agreement is approved or rejected by the state commission, federal court review is available "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. 252(e)(6). An action under *Ex parte Young* is thus fully consistent with the remedy contemplated by Congress. It does not expand the remedies or scope of judicial review available under the Act. Thus, the court of appeals correctly held here that *Ex parte Young* provides an independent basis for suit against individual state public utility commissioners to obtain review of their actions under the 1996 Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 00-593

In the
Supreme Court of the United States

Public Service Commission of Utah, Stephen F. Mecham, Constance B. White, and Clark D. Jones, Commissioners of the Public Service Commission of Utah
PETITIONERS

v.

US West Communications, Inc., MCI Telecommunications Corp., and AT&T Communications of the Mountain States, Inc.
RESPONDENTS

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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Petitioners submit the following Reply Brief to Respondents' (Qwest Corp.(formally US West Communications, Inc.), AT&T Communications of the Mountain States, Inc., and MCI Worldcom Network and MCIMetro Access Transmission Services, Inc.) Opposition Brief dated January 11, 2001.

Respondents' Statement and argument is intentionally structured to emphasis the role of the *Ex Parte Young* based jurisdictional claim of the federal district court over the individual members of the Public Service Commission of Utah. But the district court not only claimed jurisdiction over the individual commissioners, but also over the State of Utah, through the Public Service Commission of Utah, a state agency. The claimed jurisdiction over the State of Utah is not based on *Ex Parte Young*. It is based on a claimed separate jurisdictional basis; which is the lower courts' aberration of this Court's developing case law concerning state sovereign immunity expressed by this Court's precedents of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)(*Seminole* Tribe), *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Brd.*, 527 U.S. 666 (1999)(*College Savings Bank*) and *Kimel v. Florida Brd. of Regents*, 528 U.S. 62 (2000)(*Kimel*). The Respondents' Statement omits disclosure of Qwest Corporation's [Qwest's] refusal before the district court to stipulate that the proceedings before the district court would not be used as a basis for a monetary claim against the State of Utah. As identified by the Petitioners' Reply Brief filed in the District Court, Qwest had made such stipulation precluding any monetary claim against the State in prior district court proceedings,

but refused to do so in this case. Reply Memorandum of Utah Public Service Commission and Individual Commissioners, at 2-4 (D. Utah Filed April 9, 1999).

Contrary to Respondents' tack, the claimed federal court jurisdiction over the State of Utah is not "as a practical matter" the same as claimed jurisdiction over individual commissioners under *Ex Parte Young*. Respondents' Brief in Opposition, at 13, 14. Granting certiorari is needed for this Court to address its intended scope of state sovereign immunity articulated in *Seminole Tribe*, *College Savings Bank* and the other cases. This developed and developing case law was not followed by the Tenth Circuit Court of Appeals. To paraphrase and continue from Respondents' citation of *Hubbard v. United States*, 514 U.S. 695, 721 (1995) (Rehnquist, C.J., dissenting, joined by O'Connor, J. and Souter, J.), "One of the consequences of [denying the writ] is that this Court is deprived of a very important means of assuring that the courts of appeals adhere to its precedents. It is all the more important therefore, that no actual inducements to ignore these precedents be offered to the courts of appeals. But today's decision [to reject the writ would be] just such an inducement; it tells courts of appeals that if they build up a body of case law contrary to ours, their case law will serve as a basis for overruling our precedent. It is difficult to imagine a more topsy-turvy doctrine than this, or one more likely to unsettle established legal rules that the doctrine of stare decisis is designed to protect."

I. The Appellate Court's Cursory Application of *Ex Parte Young* abrogates this Court's efforts to protect state sovereign immunity.

Respondents argue that the Tenth Circuit Court's application of the *Ex Parte Young* doctrine and the result in this case does not warrant a grant of certiorari. The court of appeals decision does not even purport to attempt any effort to examine Congressional intent on the application of *Ex Parte Young* in relation to the Federal Telecommunications Act of 1996 [1996 Act]. *Seminole Tribe, supra,* directs court consideration of Congressional intent for *Ex Parte Young* private party actions against individual state officers, when sought in addition to the enforcement scheme Congress enacted for the statutorily created rights and obligations. 517 U.S., at 73, 74. Understandably, Respondents argue that the remedial scheme for the 1996 Act bears no similarity to the remedial scheme at issue in *Seminole Tribe.* Comparison of the two, however, shows striking parallels. Both follow a detailed scheme of specific, determinative time periods for party negotiation responsibilities, third party intervention to mediate or arbitrate matters upon which the negotiating parties are unable to mutually resolve and a limited role for the federal courts in enforcing the parties' underlying rights and obligations created in the respective statutes.

The 1996 Act does not explicitly or implicitly authorize a private party suit against an individual state officer, the individual commissioners in this

case. The necessary conclusion is that this evidences a lack of Congressional intent for *Ex Parte Young* suits against individual state officers. *Seminole Tribe, supra,* 517 U.S., at 75. Indeed, the 1996 Act can be read to evidence congressional intent that, just as in normal circumstances of mediation or arbitration, where a party is unsatisfied with the mediator's or arbitrator's decision, they may bring suit involving the contracting or negotiating parties, but they do not join the mediator/arbitrator or his employing entity as a party to the litigation.

Respondents rely upon a previously enacted definition of "state commission", 47 U.S. C. § 153(41), to fill this intentional void in the 1996 Act. Respondents' Brief in Opposition, at 18. The definition Respondents rely upon shows that Congress' intent, if any, is for suit against the state, not individual state officers. The definition's full language is: "State Commission. The term 'state commission' means the commission, board or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." (Emphasis added.) As used throughout the 1996 Act, Congress uses "state commission" to identify the regulatory entity which exercises a state's regulatory authority. The statutory language would cover an individual state officer only if state law allowed that individual to exercise state regulatory authority individually; as opposed to being a member of a regulatory board or commission and in conjunction with the other members. Like most states, the State of Utah does not grant any regulatory authority to individual members of the Public Service Commission. The State's regulatory authority can only

be exercised by a quorum of commissioners, acting as the Public Service Commission; not as individuals in either their personal or official capacity. Utah Code § 54-1-3. Just as in *Seminole Tribe,* Congress' language used in the 1996 Act evidences reliance upon actions of the state, rather than acts likely to be performed by an individual state officer (who under Utah state law has no authority to act individually). *Seminole Tribe* represents a significant precedent protecting the sovereign immunity of states and their officers. The 1996 Act implicates special sovereignty interests of the State of Utah. In the underlying proceedings of this case, parties called upon the Public Service Commission to apply state law to resolve their disputes.

II. Respondents' melding of federal court *Ex Parte Young* type jurisdiction over individuals with jurisdiction over a state.

While Respondents are seemingly unable to acknowledge the practical distinction between federal court jurisdiction over individual state officers claimed under *Ex Parte Young* and jurisdiction claimed over the State of Utah, the import of this Court's decisions in *Seminole Tribe, supra, College Savings Bank, supra, Kimel, supra,* and *Alden v. Maine,* 527 U.S.706 (1999), bear upon consideration of the Petition for Writ of Certiorari. The issue raised by the Tenth Circuit Court's decision and the Respondents' argument can be articulated by language from *Kimel.* "Indeed, the . . . refusal to accept the validity and natural import of decisions like *Hans,* rendered over a full century ago by this Court, makes it difficult to engage in

additional meaningful debate on the place of state sovereign immunity in the Constitution. . . . Today we adhere to our holding in *Seminole Tribe*: Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." 528 U. S., at 79, 80.

The Circuit Court's conclusion and the Respondents' effort to cast the State of Utah's options, under the 1996 Act, as a voluntary waiver of immunity consistent with *College Savings Bank* begs for this Court's further direction for the benefit of the lower courts. To characterize the 1996 Act as Congress' gratuity to the states, on condition of their waiver, ignores how Congress structured Section 252. 47 U.S.C. § 252 (e) is the ostensible basis for Congress' cooperative federalism gratuity for the State of Utah to engage in activity which otherwise would not be available to a state. But, Section 252(e) also states "nothing in this section shall prohibit a State Commission from establishing or enforcing other requirements of State law in its review of an agreement . . ." 47 U.S.C. § 252(e)(3). The result of the Tenth Circuit Court's decision is that establishing or enforcing requirements of State law (as the Utah Public Service Commission was asked to do in the underlying proceedings) is somehow not an otherwise lawful activity for the State of Utah. The perverse choice offered to the State of Utah, retain immunity or be deemed to have voluntarily waived immunity in order to establish or enforce requirements of state law, is not assuaged by recourse to the Federal Trade Commission; to fill in for a state commission where a state declines the so called gratuity and attempts to retain immunity. A state's hope for the Federal Trade

Commission to establish or enforce requirements of state law were dashed when that commission stated that it would not address state law requirements when called upon to function under Section 252 where a state declines. *First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC Docket No. 96-98, 11 FCC Rcd 154999, 1996 FCC LEXIS 4312 (Aug. 8, 1996), ¶1291.

Congress' structure of the 1996 Act's procedure for state commission involvement is the avenue given for enforcement of state law requirements. Congress included no modifier or limitation of what state laws were expected to be enforced in the Section 252 process. 47 U.S.C. § 253 specifically anticipates that the state laws to be enforced would include those pertaining to the states' property interests and protection of public safety and welfare. Whether the establishment and enforcement of these types of laws, pursuant to Constitutional state sovereign powers, is an "otherwise lawful activity" which *College Savings Bank* precludes Congress from withholding from the states, is an important federal question which this Court should address. The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted, January 17, 2001.

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In the
Supreme Court of the United States

Public Service Commission of Utah, Stephen F. Mecham, Constance B. White, and Clark D. Jones, Commissioners of the Public Service Commission of Utah
PETITIONERS

v.

US West Communications, Inc., MCI Telecommunications Corp., and AT&T Communications of the Mountain States, Inc.
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the Public Service Commission of Utah and the individual commissioners of the Public Service Commission of Utah, submit this Supplemental Brief. Pursuant to part 8 of Rule 15, a party may submit a supplemental brief calling attention to new cases not available at the time of the party's last filing.

Since the last filing, by either petitioners or respondents, the Fourth Circuit Court of Appeals issued a decision, February 14, 2001, in Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc., et al, 4th Circuit No. 99-2616, addressing sovereign immunity issues as those raised by petitioners' Petition for Writ of Certiorari filed in this case. The Fourth Circuit decision is directly contrary to the Tenth Circuit Court of Appeals' decision on waiver of a

state's Eleventh Amendment immunity and the application of the Ex Parte Young type of jurisdiction over individual members of a state utility regulatory commission in cases brought under the Federal Telecommunications Act of 1996; specifically 47 U.S.C. §252.

The conflict between the recent Fourth Circuit decision and the decision of the Tenth Circuit Court at issue in this case should bear upon this Court's consideration in granting the requested Writ of Certiorari; in addition to the reasons previously argued by petitioners in their original and reply briefs.

Submitted this 15th day of February, 2001

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No. 00-593

IN THE
Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF UTAH, STEPHEN F. MECHAM, CONSTANCE B. WHITE, and CLARK D. JONES, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH,
Petitioners,

v.

QWEST CORPORATION, MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC. and AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Pursuant to Supreme Court Rule 15.8, respondents file this supplemental brief to bring to the Court's attention the rulings issued by the United States Court of Appeals for the Fourth Circuit on February 14, 2001, in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.* (Nos. 99-2459, -2616) and *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission* (Nos. 99-1845, -1846, -1847, -1970). These decisions address questions closely related to the Eleventh Amendment issues raised in this case. They do so in ways that arguably conflict with the ruling of the Tenth Circuit on the waiver and *Ex parte Young* questions. Copies of the opinions have been lodged with the Clerk.

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